

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ANDY WARHOL FOUNDATION FOR THE )  
VISUAL ARTS, INC., )  
Petitioner, )  
v. ) No. 21-869  
LYNN GOLDSMITH, ET AL., )  
Respondents. )  
- - - - -

Pages: 1 through 123  
Place: Washington, D.C.  
Date: October 12, 2022

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4   VISUAL ARTS, INC.,                            )  
5                                    Petitioner,                            )  
6                                    v.    ) No. 21-869  
7   LYNN GOLDSMITH, ET AL.,                    )  
8                                    Respondents.                        )

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10                                   Washington, D.C.  
11                                   Wednesday, October 12, 2022

12  
13           The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 10:02 a.m.

16  
17   APPEARANCES:  
18   ROMAN MARTINEZ, ESQUIRE, Washington, D.C.; on behalf  
19       of the Petitioner.  
20   LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of  
21       the Respondents.  
22   YAIRA DUBIN, Assistant to the Solicitor General,  
23       Department of Justice, Washington, D.C.; for the  
24       United States, as amicus curiae, supporting the  
25       Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case Number 21-869, Andy Warhol Foundation versus Goldsmith. Mr. Martinez.

ORAL ARGUMENT OF ROMAN MARTINEZ  
ON BEHALF OF THE PETITIONER

MR. MARTINEZ: Mr. Chief Justice, and may it please the Court:

Both courts below agreed and Goldsmith doesn't dispute that Warhol's Prince Series can reasonably be perceived to convey a fundamentally different meaning or message from Goldsmith's photograph. The question in this case is whether that different meaning or message should play a role, any role, in the fair use analysis.

Our answer is yes. Warhol's transformative meaning puts points on the board under Factor 1 of the four-factor balancing test. Goldsmith and the Second Circuit say no. Warhol's new meaning is categorically irrelevant and can't be considered as part of Factor 1 or any other factor.

1                   I want to emphasize three points.  
2     First, the precedent supports us. Campbell  
3     unambiguously requires an examination of meaning  
4     or message. Google reaffirms that test and  
5     cites Warhol's Soup Cans as a paradigmatic  
6     example of when it's satisfied. Goldsmith's  
7     test is at odds with both cases.

8                   Second, our approach, unlike  
9     Goldsmith's, maintains a balance between  
10    protecting artists' rights to monetize their  
11    works and encouraging new and important  
12    follow-on expression. We give follow-on artists  
13    credit for innovation at Factor 1 while  
14    recognizing that Factor 4 and the other factors  
15    will sometimes cut decisively the other way.

16                  Goldsmith's necessity test, by  
17    contrast, upends that balance. It banishes  
18    transformative meaning from the equation  
19    altogether, and by doing so, it violates 107's  
20    text, contradicts precedent, and undermines  
21    copyright's key goal, promoting creativity for  
22    the public good.

23                  Finally, the stakes for artistic  
24    expression in this case are high. A ruling for  
25    Goldsmith would strip protection not just from

1 this Prince Series but from countless works of  
2 modern and contemporary art. It would make it  
3 illegal for artists, museums, galleries, and  
4 collectors to display, sell, profit from, maybe  
5 even possess a significant quantity of works.  
6 It would also chill the creation of new art by  
7 established and up-and-coming artists alike.

8 These results are repugnant to  
9 copyright and to the First Amendment. You  
10 should reject them. We ask you to reaffirm  
11 Campbell and reverse the decision below.

12 JUSTICE THOMAS: Could you give us an  
13 example of any follow-on work that fails your  
14 test?

15 MR. MARTINEZ: Sure. I think a  
16 classic example would be a -- a book-to-movie  
17 adaptation. I think that would be a follow-on  
18 work. It would be a derivative work. I think,  
19 if you -- if someone were to, you know, try to  
20 do that, I think that the -- the original  
21 creator, the author of the book, could very  
22 easily assert that that was not fair use and  
23 would have a -- a winning case under Factor 4  
24 and probably also under Factor 1. And,  
25 certainly, that would be a -- a kind of classic

1 example of a follow-on work that would not  
2 count.

3 JUSTICE SOTOMAYOR: Why? I mean,  
4 derivative works are generally in a different  
5 medium, and almost all of them, even a  
6 dramatization on -- on theater or even a motion  
7 picture or a sequel, they add something new  
8 according to your definition in your brief.

9 So why shouldn't they be protected as  
10 well according to your theory?

11 MR. MARTINEZ: Yeah, I think -- I  
12 think there's a Factor 4 issue and a Factor 1  
13 issue. I think the most obvious problem would  
14 be a Factor 4 problem for the person who's  
15 trying to copy or -- or create the -- the movie  
16 adaptation.

17 JUSTICE SOTOMAYOR: I -- I'm sorry. I  
18 read Factor 1, the purpose and character of the  
19 use, including whether such use is of a  
20 commercial nature or is for nonprofit  
21 educational purposes.

22 So what's the use here? Is -- I think  
23 I have to look at a use under 1 as well. So is  
24 the use the creation of the Prince Series by  
25 Warhol? Is it the 2016 license of the Orange

1 Prince? That factor, I think, is telling to me  
2 to look at a use.

3 So which use are you looking at?

4 MR. MARTINEZ: So -- so we think that  
5 both uses are directly implicated in this case.  
6 I know there's a significant amount of confusion  
7 between our side and the other side on this, so  
8 I'd like to try to clarify it.

9 This case came about because Ms.  
10 Goldsmith contacted the foundation, asserted  
11 that -- that the -- the original Warhol works  
12 were infringing, demanded a quite substantial  
13 seven-figure sum of money, and also demanded the  
14 copyrights in the work.

15 JUSTICE SOTOMAYOR: I --

16 MR. MARTINEZ: We then filed --

17 JUSTICE SOTOMAYOR: -- I'm a -- I'm  
18 putting that aside.

19 MR. MARTINEZ: Sure.

20 JUSTICE SOTOMAYOR: Okay? They can  
21 tell us whether they're claiming -- I think  
22 they're out of the statute of limitations, so  
23 they can't claim that.

24 MR. MARTINEZ: But --

25 JUSTICE SOTOMAYOR: So I think the

1 only thing they can claim under the statute is  
2 the 2016 license.

3 MR. MARTINEZ: No, re -- respectfully,  
4 Your Honor, that's not right, because what they  
5 claimed in their -- in their -- in their  
6 complaint, and this is at JA 120 to 121, was  
7 that they said that we were not allowed to  
8 invoke our copyright in the works.

9 And that wasn't just a past question  
10 that's sort of like water under the bridge  
11 because of the statute of limitations. That has  
12 ongoing significance because, if we --

13 JUSTICE SOTOMAYOR: All right. So  
14 then I want to break them down. Assume that  
15 it's the creation. I understand your argument.  
16 It was a painting. It was a comment on  
17 consumerism. If that's all he did, that's one  
18 thing.

19 But let's look at the 2016 license of  
20 Orange Prince, which is what I thought this case  
21 was about, but putting that aside, assume it's  
22 that.

23 MR. MARTINEZ: Okay. Assuming --  
24 assuming that we're just talking about that  
25 piece of the case, the licensing use --

1 JUSTICE SOTOMAYOR: Right.

2 MR. MARTINEZ: -- even with respect to  
3 the licensing use, you'd still need to look at  
4 Factor 1, which would look at the -- at the  
5 purpose and character of the use. And that  
6 would certainly encompass the fact that Warhol's  
7 use, the image that's being licensed, was  
8 transformative and create -- in -- in -- in  
9 infused a new meaning or message on top of  
10 Goldsmith's original work.

11 JUSTICE SOTOMAYOR: That I give you --  
12 I spot you. It should be considered.

13 MR. MARTINEZ: Well --

14 JUSTICE SOTOMAYOR: The Second Circuit  
15 didn't. But then what do I do with the rest of  
16 Factor 1, the purpose and use and -- and  
17 character of the use? Because that's not just  
18 up to the author. That's up to what was made,  
19 what use was made of Orange Prince. It was a  
20 highly commercial use. Goldsmith also licensed  
21 her photographs to magazines, just as Warhol's  
22 estate did.

23 So how is it that your 2006 license  
24 and Goldsmith's photographs do not share the  
25 same commercial purpose?

1           MR. MARTINEZ: Well, I think that it's  
2 -- it's true that -- that there is a -- a  
3 commercial purpose and so that might be a factor  
4 that would cut against us when assessing Factor  
5 1. We think that the -- the -- the quite  
6 substantial and -- and this in our view  
7 undisputed transformation in meaning or message  
8 --

9           JUSTICE SOTOMAYOR: Yeah, but for that  
10 --

11          MR. MARTINEZ: -- would -- would trump  
12 that.

13          JUSTICE SOTOMAYOR: -- don't we have  
14 to look at the context of the use?

15          MR. MARTINEZ: I -- I think you would  
16 look at all -- all the factors. But --

17          JUSTICE SOTOMAYOR: Right.

18          MR. MARTINEZ: -- but, again, Your  
19 Honor, I think your point -- it's not a small  
20 point to say that the Second Circuit got this  
21 wrong by banishing transformative meaning or  
22 message. That's a huge deal.

23          JUSTICE SOTOMAYOR: Assume that it got  
24 it wrong. The question is --

25          MR. MARTINEZ: How would we win -- how

1 would we still win?

2 JUSTICE SOTOMAYOR: -- you -- I  
3 thought your brief was arguing -- and you seem  
4 to be arguing something different today -- that  
5 the transformation standing alone gives you  
6 Factor 1.

7 MR. MARTINEZ: Right. So --

8 JUSTICE SOTOMAYOR: And I don't see  
9 how that can be.

10 MR. MARTINEZ: -- Your Honor, I think  
11 that's -- I think -- let me clarify our  
12 position. Our position is that Factor 1 has to  
13 encompass the new meaning or message. We do not  
14 deny that there are other considerations that  
15 may bear on Factor 1.

16 We think the district court below  
17 correctly recognized that the transformative  
18 meaning or message was so significant here that  
19 -- that that would mean that we win under Factor  
20 1 and, in fact, you know, for the other reasons  
21 under the other factors that we also win the  
22 whole case.

23 If you disagreed with us on that, I  
24 think what you could do is make very clear that  
25 the Second Circuit's banishment of meaning or

1 message from the inquiry was wrong. You could  
2 send it back down to them.

3 I think you should say that the  
4 transformation in meaning or message here was  
5 substantial, but if you thought that other  
6 factors had to be weighed, you could send it  
7 back down to the district court or the Second  
8 Circuit to reweigh that.

9 JUSTICE KAGAN: Mr. Martinez --

10 CHIEF JUSTICE ROBERTS: Mr. Martinez,  
11 let -- let's suppose that I think you can do  
12 this with technology instead of the mood that  
13 Prince is conveying in the Goldsmith photograph.  
14 You put a little smile on his face and say this  
15 is a new message. The message is Prince can be  
16 happy. Prince should be happy.

17 Is that enough of a transformation?  
18 The message is different.

19 MR. MARTINEZ: I -- I think you would  
20 certainly have to consider the new meaning or  
21 message as part of the inquiry. And so, if the  
22 question is whether that would be, like,  
23 categorically irrelevant, the answer is no. And  
24 I think the Second Circuit would -- would not  
25 even consider it, and, therefore, the Second

1 Circuit's wrong.

2 I think, though, Your Honor, you're  
3 sort of suggesting, I think correctly, that  
4 there might be different degrees in  
5 transformation that might make a difference in  
6 the analysis. We -- we would agree with that.

7 CHIEF JUSTICE ROBERTS: Well, what I  
8 guess I'm trying to suggest is that there may be  
9 nothing left to -- to the original author for  
10 derivative works. I mean, if that's not a  
11 derivative work, it's hard to see what would be.

12 MR. MARTINEZ: Well, I think if you're  
13 -- if -- I think it would do two things. First,  
14 at Factor 1, you would have to look at the  
15 degree of transformation in meaning or message.

16 I think that that wouldn't be  
17 dispositive of the fair use question as a whole,  
18 though, because I think you would then look at  
19 Factor 4 and you would really have to look at  
20 whether the market for the new work is -- is  
21 in a -- in a real substantial way, is going to  
22 be a market substitute or compete with either  
23 the original work or the potential derivative  
24 uses of the original work by the original  
25 author.

1           So we think -- we're -- we're not  
2 denying that Factor 4 is relevant here. We're  
3 just saying that for purposes of Factor 1, you  
4 certainly wouldn't ignore the transformative  
5 meaning or message for purposes of that factor.

6           JUSTICE KAGAN: Can --

7           MR. MARTINEZ: It just needs to be  
8 considered as part of a holistic analysis.

9           JUSTICE KAGAN: -- can I take you  
10 back, Mr. Martinez, to your answer to Justice  
11 Thomas's question? Because you said: Well, the  
12 classic example of non-transformative work would  
13 be a movie from a book.

14           And, indeed, we expect Hollywood, when  
15 it takes a book and makes a movie, to pay the  
16 author of the book. But I think moviemakers  
17 might be surprised by the notion that what they  
18 do can't be fundamentally transformative.

19           I mean, mostly movies are tons of new  
20 dialogue, sometimes new plot points, new  
21 settings, new characters, new themes. You would  
22 think new meaning and message.

23           So why is it that we, you know, can't  
24 imagine that Hollywood could just take a book  
25 and make a movie out of it without paying?

1                   MR. MARTINEZ: I -- I -- first of all,  
2 I -- I certainly agree with your -- your  
3 bottom-line conclusion that you can't just take  
4 a -- a book and make a movie out of it. I think  
5 the question is how do you get there and how do  
6 the different factors play in.

7                   We think two factors are relevant,  
8 Factor 1, Factor 4. The other factors probably  
9 also relevant, but the -- Factor 1 and 4 may be  
10 the most relevant.

11                   With respect to Factor 1, we would say  
12 that the normal sort of book-to-movie  
13 transition, we don't think that the -- the --  
14 the necessary sort of changes in the form  
15 from -- from the written word into a movie, that  
16 that would inherently be a change in meaning or  
17 message.

18                   It's possible -- and -- and we think  
19 actually in most cases, the -- the change from a  
20 book to a movie wouldn't have a different  
21 meaning or message, or, if it did, it would be  
22 very slight.

23                   I think the more fundamental reason,  
24 though, why the book-to-movie adaptation would  
25 not be fair use is Factor 4, because the classic

1 thing, if you're an author, a successful author,  
2 the -- the most natural derivative market -- the  
3 derivative use of your work and the potential  
4 market for your work, you know, you sell a  
5 million copies of your book, the next thing you  
6 want to do is make the movie based on the book.  
7 That's like the classic thing you would do.

8 And so, of course, the -- if someone  
9 comes in and makes the movie, you know, a year  
10 before you -- you make it, that would be  
11 interfering with the market for your --

12 JUSTICE KAVANAUGH: Isn't the  
13 classic --

14 MR. MARTINEZ: -- for your potential  
15 market.

16 JUSTICE KAVANAUGH: -- isn't the  
17 classic thing with a photograph that it'll be  
18 used in stories about the subject of the  
19 photograph and, therefore, competing in the same  
20 market that this adaptation was used in?  
21 Namely, it was used in a story about Prince, not  
22 a story about Warhol.

23 And at least from the perspective of  
24 the other side and some of the amicus briefs,  
25 that's the key distinction here.

1           MR. MARTINEZ: I -- I don't -- I don't  
2 think so, Your Honor. I don't think -- and I  
3 think the Second Circuit actually agreed with us  
4 on this. They said that the -- the -- the  
5 primary work itself would not actually compete  
6 as a market substitute for -- with -- with  
7 Goldsmith's photograph. And I think that's  
8 exactly right.

9           I don't think that the -- the standard  
10 use of -- of Goldsmith's work would be to  
11 create, you know, Warhol-style transformed  
12 celebrity, you know -- fine art portraits in the  
13 way that Warhol did.

14           And I -- I think, if -- in any event,  
15 if you had concerns about that --

16           JUSTICE KAVANAUGH: No, but it's used  
17 --

18           MR. MARTINEZ: -- it's really a Factor  
19 4 --

20           JUSTICE KAVANAUGH: -- I mean, I guess  
21 this goes to the use, but it's being used in a  
22 story about Prince, just like the '84 story in  
23 Vanity Fair.

24           MR. MARTINEZ: Oh, you mean the story  
25 like the Vanity Fair article?

1 JUSTICE KAVANAUGH: Mm-hmm.

2 MR. MARTINEZ: I -- I don't -- well, I  
3 -- I guess what I would say is that if you think  
4 that that's a competing sort of substitute,  
5 that's a Factor 4 inquiry. I think that the  
6 court below recognized that -- that the Warhol  
7 work did not compete as a market substitute at  
8 Factor 4 with the Goldsmith photograph and this  
9 is really a Factor 1 case.

10 JUSTICE JACKSON: Can I -- sorry.

11 MR. MARTINEZ: Yes, Justice Jackson,  
12 sorry.

13 JUSTICE JACKSON: Can I have you focus  
14 in on Factor 1? Because I sort of thought that  
15 that's really what we were focused on here. And  
16 you continue to say that me -- meaning and  
17 message -- you think the problem with the Second  
18 Circuit is that they banished meaning and  
19 message from that factor. I understand that.

20 But it doesn't help me to understand  
21 how you use or you purport to use meaning and  
22 message in the context of the purpose or  
23 character -- and character inquiry in Factor 1.

24 So I could see, for example, as we  
25 evaluate the purpose and character of the use,

1 that you might say: Well, this is a new purpose  
2 insofar as our purpose was to provide a new  
3 meaning and message. So it's sort of embedded  
4 in the consideration of purpose, or this is --  
5 has a new character because -- because it  
6 conveys a new meaning and message.

7 Is that how you're doing this? I  
8 didn't see you --

9 MR. MARTINEZ: Sure.

10 JUSTICE JACKSON: -- filtering mean --  
11 meaning and message through --

12 MR. MARTINEZ: So --

13 JUSTICE JACKSON: -- purpose and  
14 character.

15 MR. MARTINEZ: -- thank you, and thank  
16 you for focusing on the text. Let talk about  
17 the text. The text talks about purpose and  
18 character. I don't think there's any real  
19 dispute about what those words mean. We think  
20 that the transformative meaning or message  
21 directly affects both purpose and character, so  
22 let me just take them one at a time.

23 With respect to purpose, we're talking  
24 about visual art, and visual art is intended to  
25 be seen by audiences. The -- a major purpose of

1 visual artists is to communicate through their  
2 work, you know, when they put the work in front  
3 of the audience, certain meanings or messages to  
4 that audience.

5 JUSTICE JACKSON: Can I just stop you  
6 for a second? Are you just sort of  
7 hypothesizing about that, or are you saying that  
8 was actually the purpose of this use in this  
9 situation?

10 MR. MARTINEZ: I think --

11 JUSTICE JACKSON: Because anybody can  
12 sort of say after the fact, oh, a purpose of  
13 visual art is X. I thought this was about --

14 MR. MARTINEZ: I think --

15 JUSTICE JACKSON: -- the purpose of  
16 the use in this particular case.

17 MR. MARTINEZ: I don't -- I don't  
18 think it's -- I don't think it's disputed and I  
19 think it's common sense that -- that artists  
20 like Warhol intended their works to be seen and  
21 -- and were intending to communicate, you know,  
22 messages through their works.

23 JUSTICE JACKSON: So it wasn't the  
24 purpose of this particular use to illustrate the  
25 Vanity Fair article. This is where the

1 commercial part comes in.

2 MR. MARTINEZ: I --

3 JUSTICE JACKSON: That wasn't the  
4 purpose?

5 MR. MARTINEZ: That -- that was part  
6 of the purpose if you look at it at a higher  
7 level of generality. We're not saying that's  
8 irrelevant. But I think even when you look at  
9 the actual article it was illustrating, it was  
10 illustrating an article entitled "Purple Fame"  
11 that was all about Prince's, like, emerging  
12 celebrity iconic status.

13 And so perfectly natural to illustrate  
14 that article that you would want a Warhol-type  
15 work that has as its meaning or message a -- a  
16 -- a picture of Prince that shows him as the  
17 exemplar of sort of the dehumanizing effects of  
18 celebrity culture in America.

19 JUSTICE ALITO: How is it --

20 MR. MARTINEZ: Just to go back to  
21 the -- oh, sorry.

22 JUSTICE ALITO: No, no, fin -- go  
23 ahead. Finish.

24 MR. MARTINEZ: But just to go on the  
25 text, so I do think that a new meaning or

1 message, like, necessarily changes the purpose  
2 of the original work.

3 As to character, just briefly,  
4 character just means a quality, trait, or  
5 attribute. And, certainly, if -- if the -- the  
6 message of the work changes, that would be a  
7 quality, trait, or attribute of the work.

8 And I think the problem with  
9 Goldsmith's side is that they're essentially  
10 arguing that a new meaning or message has  
11 nothing to do with purpose, has -- doesn't  
12 change the character of the work, and it's  
13 just -- the only level of generality you can  
14 look at those things is -- is at the level of,  
15 well, they're both portraits of Prince, they  
16 must be the same. And I don't think that's a  
17 common sense or appropriate way to look at this.

18 Sorry, Justice Alito.

19 JUSTICE ALITO: How is a -- a court to  
20 determine the purpose or meaning, the message or  
21 meaning of works of art like a photograph or a  
22 painting? Should it receive testimony by the  
23 photographer and the artist? Do you call art  
24 critics as experts? How does a court go about  
25 doing this?

1           MR. MARTINEZ: So, Justice Alito, I  
2 think that the short answer is I think the court  
3 can do it in exactly the same way that this  
4 Court and the lower courts did in the Campbell  
5 case.

6           So, in the Campbell case, the issue  
7 was parody, but in or -- one of the issues in  
8 the case was whether the 2 Live Crew song was,  
9 in fact, a parody, and in -- in order to do  
10 that, the Court needed to assess what the  
11 meaning or message of the work was.

12           And Justice Souter, in his opinion for  
13 the Court at page 583, he -- he sort of, like,  
14 does his own analysis. So I think you could  
15 just look at the two works and figure out what  
16 you think as a judge.

17           But I think that more likely, in most  
18 of these cases, the way that they've been  
19 litigated for almost 40 years, that the  
20 litigants would put forward -- in addition to  
21 the works themselves, put forward evidence.  
22 Sometimes it's evidence from the -- the creator,  
23 both creators. Sometimes it's expert evidence.  
24 Sometimes it's other kinds of evidence.

25           But that's sort of like the standard

1 run-of-the-mill way that -- that -- that  
2 litigants in -- in these copyright cases try to  
3 argue about and establish meaning or message.  
4 And we think that's totally appropriate in this  
5 circumstance.

6 JUSTICE ALITO: Well, you make it  
7 sound --

8 JUSTICE KAGAN: But even --

9 JUSTICE ALITO: -- you make it sound  
10 simple, but maybe it's not so simple at least in  
11 some cases to determine what is the meaning or  
12 the message of -- of a work of art. There can  
13 be a lot of dispute about what the meaning or  
14 the message is. Some people would say it's not  
15 necessarily the meaning or the message that the  
16 artist had in mind.

17 I don't know, if you called Andy  
18 Warhol as a -- as a witness, what would he say  
19 was the purpose of his -- and the me -- the  
20 message or meaning of his -- of his creation?

21 MR. MARTINEZ: I -- I wish I could  
22 answer that question. He's not with us, as you  
23 know, Your Honor.

24 JUSTICE ALITO: I know that.

25 MR. MARTINEZ: But -- but I will say

1 -- I will say this about the problem that you've  
2 pointed to, which is a real concern, and I  
3 understand why it's a real problem. I think  
4 that the answer to that problem is solved by  
5 Campbell, because Campbell does not say that the  
6 court or the fact finder needs to figure out the  
7 meaning or message. It says it needs to figure  
8 out whether a new meaning or message could  
9 reasonably be perceived.

10 And that creates a -- a -- a bit of a  
11 -- of latitude, of -- of -- of sort of wiggle  
12 room that -- that defers to the fact that there  
13 might indeed be, you know, a bunch of different  
14 reasonable interpretations of art.

15 JUSTICE KAGAN: You say in your -- in  
16 your reply brief that the new thing has to be  
17 important, correct?

18 MR. MARTINEZ: That's -- taking that  
19 from Google, new and important, yes.

20 JUSTICE KAGAN: And -- and -- and how  
21 does -- how do you go about thinking about  
22 what's important --

23 MR. MARTINEZ: Well, I think you would  
24 --

25 JUSTICE KAGAN: -- in the follow-on

1 work?

2 MR. MARTINEZ: I think, in the context  
3 of copyright law, you would look at important in  
4 light of the objectives of copyright law. And,  
5 here, it's promoting creativity for the public  
6 good. And so you would look at that just the  
7 same way that Judge Leval talked about in -- in  
8 his -- in his decision and I think the way that  
9 both the Campbell and Google Courts did.

10 And what Google said, right after it  
11 said --

12 JUSTICE KAGAN: I mean, that doesn't  
13 give me a lot of specificity. I understand that  
14 we're supposed to be encouraging creativity, but  
15 -- but what's the difference in the follow-on  
16 work that when we look at it, we can say, well,  
17 that's an important difference that does  
18 something that -- that we really need to hear or  
19 to see?

20 MR. MARTINEZ: So what the Court said  
21 in Campbell was it equated the new or important  
22 inquiry with -- with a serious inquiry into  
23 transformative meaning or message. And when the  
24 -- when Campbell uses that language, "new and  
25 important," it's immediately following the --

1 the sentence where it's quoting -- sorry -- when  
2 Google uses that phrase, it's immediately  
3 following the place where it -- it quotes the  
4 language in Google -- in Campbell that says new  
5 meaning or message, you know, count.

6 JUSTICE SOTOMAYOR: Counsel, going  
7 back to your answer to Justice Kavanaugh and now  
8 to Justice Kagan, what's the right level of  
9 generality? You keep going back to the author's  
10 purpose, and I can't stay there because, when I  
11 look at Harper & Row, we defined the purpose of  
12 the use as news reporting. In Campbell, we  
13 repeatedly referred to the uses -- the use as  
14 its parody character. In Google, we talked  
15 about creating a new product that does something  
16 different.

17 That's a fairly high level of  
18 generality, and that's the level we talked of.

19 MR. MARTINEZ: Well, I think --

20 JUSTICE SOTOMAYOR: And so --

21 MR. MARTINEZ: Sorry.

22 JUSTICE SOTOMAYOR: -- I don't know  
23 why the level that we talk about here is the  
24 actual use, which is what Section 1 tells us to  
25 do, of this piece of art. And we go back to

1 Justice Kavanaugh's point, the specific use was  
2 of this one part of the Prince Series, only one  
3 level of it, as a photograph in the life of  
4 Prince.

5 Now that use -- you say on Factor 4  
6 that it doesn't compete with the photograph,  
7 Goldsmith's photograph, but hard to see how not.  
8 They both sell photographs to magazines, and  
9 they both sell photographs to magazines to  
10 display Prince's -- Prince's vision or Prince's  
11 look.

12 So I guess I go back to my point,  
13 which is why isn't the general -- the -- the  
14 higher level of generality what Section 1 is  
15 looking at?

16 MR. MARTINEZ: Your Honor, I don't  
17 think that that's what Section 1 is getting at,  
18 but I think Campbell makes that absolutely clear  
19 because, if it were the case that you had to  
20 look at the higher level of generality, in  
21 Campbell, what you would have said is you have a  
22 Roy Orbison song that's a work of popular music  
23 that's commenting on sexual attraction, and you  
24 have a 2 Live Crew song that's also a work of  
25 popular music, also commenting on sexual

1 attraction, they would have the same purpose.

2 But you didn't do that. Instead, you  
3 said let's -- we need to look at the meaning or  
4 message, and then you analyzed whether the  
5 second work was -- had a different meaning or  
6 message because it was commenting on the first.  
7 So you had to do that analysis.

8 And I actually think Goldsmith's test  
9 actually requires you to do that analysis.  
10 They're not asking you to overturn the parody  
11 case law. What they're asking you to say is to  
12 -- is that -- that the only meaning or message  
13 that can possibly ever count as a difference in  
14 meaning or message is when you have a parody.  
15 But that's -- that's arbitrary --

16 JUSTICE KAVANAUGH: Isn't the --

17 JUSTICE BARRETT: Well, I don't think  
18 --

19 JUSTICE KAVANAUGH: -- isn't the --

20 JUSTICE BARRETT: -- that's true. I  
21 mean, I -- I think that the -- one -- one thing  
22 that Campbell pointed out is that 2 Live Crew  
23 couldn't have parodied or -- and this would also  
24 apply to commenting on, this would also apply to  
25 critiquing maybe in the way that Warhol's

1 Campbell Soup painting does, but that you needed  
2 the object. He didn't need or Warhol didn't  
3 need Goldsmith's particular photo, right? I  
4 mean, it could have been a different photo of  
5 Prince.

6 MR. MARTINEZ: Well, what Goldsmith  
7 said below is that he did need the -- the photo.  
8 And I think that's -- that's reflected in the  
9 district court opinion.

10 But I think leaving -- just stepping  
11 back from the question of -- of need, I think  
12 that it's true that in parody there might be a  
13 -- an especially strong need to quote from the  
14 -- the work that you're critiquing. But that's  
15 not -- that doesn't mean that -- that -- that  
16 that's a requirement of transformative meaning  
17 or message.

18 And as Your Honor pointed out, when  
19 Google invokes the soup cans hypothetical, the  
20 soup cans -- you know, if you're come -- if  
21 you're issuing a -- a comment on consumerism,  
22 you don't need to use, you know, a copyrighted  
23 Campbell's soup can logo in order to make that  
24 comment.

25 JUSTICE BARRETT: Yeah. But you could

1 use Cheerios. I mean, you'd have to use -- I  
2 mean, it -- it doesn't -- it has --

3 MR. MARTINEZ: You could find some --

4 JUSTICE BARRETT: Yeah. It just  
5 doesn't have --

6 MR. MARTINEZ: You could find one  
7 that's not copyrighted.

8 JUSTICE BARRETT: -- the same punch if  
9 it's generic. Well -- okay.

10 MR. MARTINEZ: But I think with the --  
11 but I think the soup cans example is especially  
12 helpful on that point because it doesn't look  
13 for some sort of need or justification. You  
14 know, neither party sort of argued and the  
15 courts below didn't, like, assess a necessity  
16 test.

17 I -- I understand Goldsmith at this  
18 stage in the case to be introducing for the  
19 first time a kind of indispensability  
20 requirement, which is -- has really no footing  
21 in any of the Court's case law and really  
22 wouldn't make a lot of -- of sense. Certainly,  
23 the soup cans example, it was not, like,  
24 indispensable for -- for Warhol to -- to use the  
25 Campbell's soup logo in order to create that

1 image, and yet the Court itself recognized that  
2 was a paradigmatic example of -- of fair use.

3 JUSTICE KAVANAUGH: You said something  
4 in -- a minute ago about commenting on the  
5 original being a key feature. And I think  
6 that's true with those -- of the examples listed  
7 in the statutory text as well where they're  
8 commenting on the original. And I think that  
9 the -- the import of Campbell is that parody is  
10 a comment on the original in some respects.

11 But how is a photograph used in an  
12 article about Prince commenting in any way on  
13 the original photograph? You might say that's  
14 the wrong way to look at it probably, but if  
15 that's what you're going to say, tell me why.

16 MR. MARTINEZ: Can I just answer the  
17 -- the -- your point about the text?

18 JUSTICE KAVANAUGH: Mm-hmm.

19 MR. MARTINEZ: Because I think that  
20 the text does not actually require commenting or  
21 criticizing the original. It just says comment  
22 or criticism. And so there's nothing textually  
23 that requires the comment actually to be the  
24 original.

25 I think the better way to understand

1 the text is if you look at Justice Blackmun's  
2 dissent in the Sony case, not a point that was  
3 -- this point was not, you know, what he was  
4 dissenting on, but he was describing those  
5 different uses, and what he said is that they're  
6 all productive uses. And -- and that was the  
7 term that was used at that time to talk about  
8 the sort of transformative uses --

9 JUSTICE KAVANAUGH: Well, if --

10 MR. MARTINEZ: -- that we're talking  
11 about now.

12 JUSTICE KAVANAUGH: -- if you go to  
13 Campbell, the -- the part of Campbell right  
14 before the part that you quoted says the central  
15 purpose of this investigation is to see in  
16 Justice Story's words whether the new work  
17 merely see -- supersedes the objects of the  
18 original creation or, instead, adds something  
19 new.

20 MR. MARTINEZ: Exactly. And so I  
21 think what -- what "supersedes" is doing there  
22 is it's set up as a -- it's juxtaposed as the  
23 opposite of what comes after the "instead"  
24 clause. And what the "instead" clause is new  
25 meaning or message.

1                   And so I think what it's recognizing  
2                   is that the superseding that Justice -- Justice  
3                   Story was worried about is when you don't have a  
4                   new meaning or message.

5                   JUSTICE KAVANAUGH: Can you go back to  
6                   the question I asked about --

7                   MR. MARTINEZ: Sure. Right.

8                   JUSTICE KAVANAUGH: -- when a  
9                   photograph is used in a --

10                  MR. MARTINEZ: Is it commenting on the  
11                  original?

12                  JUSTICE KAVANAUGH: -- in -- in a  
13                  story about the subject of the photograph, how  
14                  is that not superseding the object of the  
15                  original photograph?

16                  MR. MARTINEZ: So it's -- it's not  
17                  because it has a transformative meaning or  
18                  message. It would have sent a different message  
19                  to have -- to use the Goldsmith photograph  
20                  illustrating that "Purple Fame" article. The  
21                  "Purple Fame" picture, the picture that  
22                  accompanied that -- that article, was intended  
23                  to -- or did show its -- its meaning. Its  
24                  meaning or message was about the dehumanizing  
25                  effects of celebrity as applied to Prince.

1           The Goldsmith photograph, as she  
2 herself said below -- this is at JA 490 --  
3 around 496 -- she was testifying as to what she  
4 was capturing was a photo realistic portrait of  
5 Prince that showed him as fragile and  
6 vulnerable.

7           There's no real dispute in this case  
8 that the meaning or message of the two works  
9 were different. The only real question this  
10 case is whether that difference matters.

11           And it has to matter both because of  
12 the text of 107, which talks about purpose and  
13 character, and -- sorry.

14           JUSTICE KAVANAUGH: Does it matter,  
15 though, how the new photograph, the Warhol  
16 photograph, is used? It's used in a magazine  
17 article about Prince. That would be one thing.  
18 It's used in a museum setting.

19           MR. MARTINEZ: I --

20           JUSTICE KAVANAUGH: That might be  
21 something very different because the Goldsmith  
22 photograph competes with the Warhol in the  
23 first.

24           MR. MARTINEZ: I think, if you're  
25 talking about a particular use, absolutely, it

1 would matter for Factor 4. I think it would  
2 also potentially matter as to Factor 1, but it  
3 wouldn't cancel out the fact that you would have  
4 to consider transformative meaning or message.

5 I just want to emphasize, though, and  
6 -- and this is a very important point, this case  
7 really is not about just the licensing use.  
8 This case is about the creation. If you look at  
9 the request that -- her request for relief and  
10 our request for relief in the original  
11 complaints, this was a dispute over who owns the  
12 copyright to these works.

13 She was asking for an injunction from  
14 us that would prevent us not just from licensing  
15 the one 2016 work, she wanted a -- an injunction  
16 that would prevent us from reproducing,  
17 displaying, selling, or licensing those works.

18 The -- the -- the order that we won  
19 from the district court was -- was an order that  
20 as a matter of law summary judgment fair use as  
21 to all 16 works. She didn't dispute that. In  
22 fact, she proposed the order that the district  
23 court ultimately issued.

24 So this case is not just about the  
25 use. It's about the creation. And the reason

1     that she wants to change the subject and make it  
2     only about the creation -- about the licensing  
3     use is because she realizes that if this case --  
4     this case is about use -- about the creation of  
5     the works, then it would have dramatic spillover  
6     consequences not just for the Prince Series but  
7     for all sorts of works of modern art that  
8     incorporate preexisting images and use  
9     preexisting images as raw material in generating  
10    completely new creative expression by follow-on  
11    artists.

12                   JUSTICE KAGAN:  I -- I wonder, Mr.  
13    Martinez, if your case doesn't benefit from a  
14    certain kind of hindsight.  I mean, now we know  
15    who Andy Warhol was and what he was doing and  
16    what his works have been taken to mean, so it's  
17    easy to say that there's something importantly  
18    new in what he did with this image.

19                   But, if you imagine Andy Warhol as a  
20    struggling young artist, who we didn't know  
21    anything about, and then you look at these two  
22    images, you might be tempted to say something  
23    like, well, I don't get it.  All he did was take  
24    somebody else's photograph and put some color  
25    into it.

1           So -- so it seems that it's harder  
2           than you say. I mean, we can't always count on  
3           the fact that Andy Warhol is Andy Warhol to know  
4           how to make this inquiry.

5           MR. MARTINEZ: Yeah. I think  
6           you're -- you're right in part, Justice Kagan,  
7           but I actually think that that sort of  
8           emphasizes the importance of this case. This  
9           case isn't just about Warhol. It's about the  
10          young and -- and up-and-coming artists who want  
11          to be Warhol's successors.

12          You know, the artists' amicus brief, I  
13          think, says that the average, you know, salary  
14          or -- or earnings for a young artist is less  
15          than \$50,000 a year. Think about what it would  
16          be like for that artist who wants to create new  
17          and innovative work that in -- integrates  
18          preexisting images.

19          If this Court were to adopt  
20          Goldsmith's rule and say that that's not going  
21          to count, it's -- the fact that you're doing  
22          something completely new and different in terms  
23          of meaning or message, it makes no difference,  
24          that person is going to be dissuaded.

25          They don't want to have -- be tied up

1 in litigation where they're going to have to pay  
2 attorneys' fees. They don't want to have  
3 their -- their -- their hard work then nullified  
4 and their copyrights essentially taken over by  
5 -- by people who -- who created the original  
6 works.

7 So this case is very important not  
8 just for those artists. It's also important for  
9 museums, collectors, galleries who want to  
10 display these works. I see my time's expired.

11 CHIEF JUSTICE ROBERTS: Yeah. Thank  
12 you, counsel.

13 Under your test, you know, there are  
14 artists whose work consists of a single color  
15 within a frame, right? I'm sure you recognize  
16 those. And --

17 MR. MARTINEZ: So I've heard, Your  
18 Honor.

19 CHIEF JUSTICE ROBERTS: Yeah.  
20 Mondrian, Albers. And let's say somebody has --  
21 uses a different color. You know, the original  
22 is blue, and the -- the -- the allegedly  
23 copyright violation work is -- is yellow.

24 Sort of following up on Justice  
25 Alito's point, if you got art critics to come in

1 and say that blue sends a particular message,  
2 yellow sends a different one, would -- would  
3 that satisfy any claim of copyright violation?

4 MR. MARTINEZ: Well, I think, at -- at  
5 the threshold, you'd have a question of whether  
6 that was -- that was, you know, infringement or  
7 not. I don't think anyone can copyright a  
8 color. But just assuming it was infringement, I  
9 think you would look at --

10 CHIEF JUSTICE ROBERTS: Well, are  
11 those -- I mean, maybe you don't know, but, I  
12 mean, are those paintings copyrighted or --

13 MR. MARTINEZ: I -- I don't know the  
14 specific paintings, Your Honor. Sorry. But  
15 with re --

16 CHIEF JUSTICE ROBERTS: Well, they're  
17 a frame with a color in them.

18 MR. MARTINEZ: I think, if it was just  
19 the color, I don't think you can copyright a  
20 color. I do think, though -- let's just assume  
21 that -- that you made other changes and there  
22 was a -- a -- some sort of minor change.

23 I think you would still do the -- the  
24 four-factor analysis. I think, at Factor 1, you  
25 would have to look whether there's, in fact, a

1 new meaning or message.

2           It sounds to me like under the  
3 hypothetical there's no difference in meaning or  
4 message. And so I think it would be a -- a  
5 loser under Factor 1.

6           CHIEF JUSTICE ROBERTS: Well, you --  
7 you and I might think there's no difference, but  
8 I'm sure there's an art critics who will tell  
9 you there's a great difference between blue and  
10 yellow.

11           MR. MARTINEZ: And -- and I think what  
12 a court would have to do in -- in -- if you're  
13 assessing whether those two works -- again,  
14 assuming that there was infringement, assessing  
15 whether there -- they had a different meaning or  
16 message, you would have to listen to those  
17 critics and you -- you know, we see experts on  
18 both sides of almost every case, right, and they  
19 don't always say the things that persuade the  
20 court.

21           And you'd have to take them seriously  
22 to the extent that you would listen to their  
23 arguments, and then you'd judge whether it was  
24 reasonably perceive -- whether their view of --  
25 of a transformed meaning or message is

1 reasonable, whether it could reasonably be  
2 perceived.

3           And I think that in a lot of these  
4 cases, where you're really talking about a very  
5 minor change and -- and someone's just a  
6 knock-off artist making a bogus claim to new  
7 meaning or message, I think that juries or fact  
8 finders can exercise their common sense and say  
9 that there's no transformative meaning or  
10 message there.

11           CHIEF JUSTICE ROBERTS: Thank you.  
12 Justice Thomas?

13           JUSTICE THOMAS: I assume that the  
14 Orange Prince is -- is -- is copyright.

15           MR. MARTINEZ: Yes. And I think that  
16 copyright's directly at issue in this case.

17           JUSTICE THOMAS: The -- let's say that  
18 I'm both a Prince fan, which I was in the '80s,  
19 and --

20           (Laughter.)

21           JUSTICE KAGAN: No longer?

22           (Laughter.)

23           JUSTICE THOMAS: Well --

24           (Laughter.)

25           JUSTICE THOMAS: -- so only on

1 Thursday nights.

2 (Laughter.)

3 JUSTICE THOMAS: But let's say that  
4 I'm also a Syracuse fan and I decide to make one  
5 of those big blow-up posters of Orange Prince  
6 and change the colors a little bit around the  
7 edges and put "Go Orange" underneath.

8 Would you sue me --

9 MR. MARTINEZ: Would -- would -- would  
10 -- would --

11 JUSTICE THOMAS: -- for infringement?

12 MR. MARTINEZ: -- would the War --  
13 would the Warhol foundation sue you if you were  
14 to do that?

15 JUSTICE THOMAS: Well, you're their  
16 lawyer, so --

17 MR. MARTINEZ: I -- I can't comment on  
18 whether we would sue you. But I think, to --  
19 to -- to try to get at your question, Your  
20 Honor, I think the question of whether that  
21 would be fair use, I mean, it sounds like  
22 you're, by hypothesis, asking me to consider  
23 that there's, like, a different meaning or  
24 message associated with the work. I don't think  
25 that's the only part of the -- the inquiry.

1 I think that everyone recognizes that  
2 at Factor 1, the ultimate goal here is to figure  
3 out whether the follow-on user is doing  
4 something sort of creative that matters --

5 JUSTICE THOMAS: Oh, I'm just waving  
6 it in the -- I'm waving it during the game with  
7 a big Prince face on it, "Go Orange."

8 MR. MARTINEZ: Yeah. I -- I think  
9 that in -- in circumstances like that, where I  
10 -- it's very unlikely if it was just one of you  
11 that -- that -- that anyone would see you.

12 JUSTICE THOMAS: Oh, no, no. I -- I'm  
13 going to market it to all my Syracuse buddies.

14 (Laughter.)

15 MR. MARTINEZ: So I think, in that  
16 case, the -- a court would -- would quite  
17 reasonably look at that and say that this is not  
18 the kind of -- of productive creativity  
19 promoting use that is -- is --

20 JUSTICE THOMAS: So, in other words,  
21 you would sue me?

22 (Laughter.)

23 MR. MARTINEZ: I would not sue -- I --  
24 I -- I think that -- I think that you would  
25 probably have a very weak case against me, Your

1 Honor.

2 JUSTICE THOMAS: So -- but you've just  
3 changed position with Goldsmith then.

4 MR. MARTINEZ: No, not at all, Your  
5 Honor. I think that in -- in this kind of  
6 circumstance, I think this -- this is totally  
7 different because there is a transformative  
8 meaning or message and there's an enormous  
9 amount of creativity.

10 JUSTICE THOMAS: Well, I had "Go  
11 Orange" under it. I had -- I've changed the  
12 message.

13 MR. MARTINEZ: Right. But, as I was  
14 saying, in addition to the -- the difference in  
15 meaning or message, I think it's fair to  
16 consider at Factor 1 whether the kind of  
17 transformation is the kind that the copyright  
18 laws are intended to foster, which is really  
19 encouraging follow-on artists to -- to use  
20 creativity to kind of introduce new ideas into  
21 the public domain.

22 I think that -- that with all respect  
23 to your -- your very accomplished re-rendering  
24 of Prince, I think that what War -- what Warhol  
25 did here, as even Goldsmith concedes, was very

1 substantially creative and -- and absolutely is  
2 consistent with the goals of copyright law.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: Very often a popular  
5 song will be originally performed by one artist  
6 and then other artist come along and perform it  
7 in a very different way. Presumably, they think  
8 that they are conveying a different meaning or  
9 message when they alter the way it's performed.

10 Is it possible for any of them to --  
11 that any of them would not be infringing the --  
12 the original copyright?

13 MR. MARTINEZ: I think it would be  
14 very hard to imagine a circumstance in which  
15 they were not infringing ultimately under the --  
16 you know, the -- the full analysis.

17 JUSTICE ALITO: Why would that be?

18 MR. MARTINEZ: Well, I think it would  
19 be in part because of Factor 4 because I think  
20 that you would have -- you know, it would sound  
21 like if you -- if you have -- Roy Orbison does a  
22 version of "Pretty Woman" and then another sort  
23 of Roy -- Roy Orbison style "Pretty Woman"  
24 emerges, I think it would directly compete with  
25 the original. So I think you'd have a very big

1 Factor 4 problem.

2 I think, under Factor 3, if you're  
3 taking a -- an enormous, you know, percentage of  
4 the work, that would weigh against you as well.  
5 I think that, you know, would you get points on  
6 the board because of a transformative meaning or  
7 message? Maybe. But I don't think that in that  
8 kind of hypothetical that that would win the  
9 day.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Sotomayor?

12 JUSTICE SOTOMAYOR: I think my  
13 colleague, Justice Thomas, needs a lawyer.

14 (Laughter.)

15 JUSTICE SOTOMAYOR: And I'm going to  
16 provide it.

17 The -- I see the first and fourth  
18 factors as closely related. And I think he has  
19 a better case because he's not using it at the  
20 game for commercial purposes. But even if he  
21 were, it wouldn't be related to the picture. It  
22 would be related to the team. That's no  
23 different than that case involving -- what mayor  
24 was it?

25 MR. MARTINEZ: The Kienitz case?

1 JUSTICE SOTOMAYOR: Yes, exactly, in  
2 which the T-shirts took his face and put  
3 something about his statement about a party on  
4 the T-shirt. And the Court said that's okay  
5 because that was really a commentary on social  
6 issue, and it is commercial but in a different  
7 way.

8 But I -- what I don't -- having a  
9 problem with is, why doesn't the fourth factor  
10 just destroy your defense in this case? Meaning  
11 you licensed directly to a magazine, which is  
12 exactly what the original creator does, and as  
13 Justice Kavanaugh said, it was licensing to the  
14 very topic that both do, which is two magazines  
15 that are talking about the life of War -- not  
16 Warhol, but of Prince.

17 So why isn't that direct competition?

18 MR. MARTINEZ: So a couple comments on  
19 that.

20 JUSTICE SOTOMAYOR: And -- and for  
21 commercial purposes.

22 MR. MARTINEZ: First -- first of all,  
23 just to -- just to reemphasize, it's not just  
24 the licensing use in this case. But just  
25 assuming we're just talking about the licensing

1 use here, I think that -- that Judge Koeltl's  
2 analysis of Factor 4 is essentially correct.  
3 And -- and with respect to the Second Circuit, I  
4 think the Second Circuit's analysis of Factor 4  
5 was overly influenced by its impression that  
6 these were essentially, for all intents and  
7 purposes, the same work because they were both  
8 portraits of Prince.

9           If we were going to rerun the Factor 4  
10 analysis and if you wanted to look at it, I  
11 would just suggest you look at the briefing in  
12 -- in the lower courts because we obviously  
13 didn't do it here. I think the key things that  
14 I would suggest that -- that would deserve  
15 attention would be, who is the audience for  
16 Warhol, Warhol's licensing versus Goldsmith's  
17 licensing?

18           I think there's substantial record  
19 evidence showing that the -- the audience is  
20 different in terms of the license -- the people  
21 who would do the licensing, where Goldsmith's  
22 works were predominantly being targeted more to  
23 photorealistic sort of like -- you know, like a  
24 Newsweek or -- or, in most cases, like rock and  
25 roll magazines and other kinds of -- of

1 publications.

2 I think you'd look at the price to see  
3 whether there were market substitutes. There,  
4 you'd see that Warhol's works, even at the  
5 licensing as opposed to the -- the -- the  
6 purchase of the original works, were selling for  
7 a lot more. I think you would look at the  
8 aesthetics. The -- the aesthetics are quite  
9 different. And I also think you would look at  
10 the transformed meaning or message.

11 All those things, I think -- we think  
12 we -- we would win for the reasons that the  
13 district court said.

14 If you disagreed with us on that, I  
15 think maybe you would say this is a -- a fact  
16 issue that's got to go to a jury. But it  
17 certainly wouldn't be summary judgment on -- as  
18 to Factor 4 for Goldsmith.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?  
20 Justice Gorsuch?

21 JUSTICE KAVANAUGH: In 1984, did  
22 Vanity Fair need to pay Goldsmith?

23 MR. MARTINEZ: No, Your Honor. I  
24 think -- I don't think they needed to pay, but I  
25 think what this Court recognized in Campbell is

1 that if people offer to pay or do pay, that  
2 doesn't -- that doesn't make a difference. I  
3 mean, I think, in -- in the 2 Live Crew example,  
4 they, in fact, did try to -- to get a license  
5 even though, as the Court recognized, it wasn't  
6 required.

7 JUSTICE KAVANAUGH: And then, in your  
8 point about up-and-coming artists, obviously,  
9 that can be played both ways. And some of the  
10 amicus briefs -- I just want you to comment on  
11 this. One of the amicus briefs says your  
12 position poses an existential threat to  
13 photographers. So I just want you to comment on  
14 that.

15 MR. MARTINEZ: We -- we -- we -- we --  
16 we absolutely strongly disagree with that.

17 JUSTICE KAVANAUGH: And -- and why,  
18 though?

19 MR. MARTINEZ: Because we think that  
20 -- that the kind of transformation that's  
21 important here is -- is -- is something that  
22 really adds -- it creates a new original work in  
23 a fundamental way, not just because the work's  
24 in a different form or because it has different  
25 colors; because it has a different meaning or

1 message.

2           And I don't think in the circumstance,  
3 especially if -- if we are right on Factor 4  
4 that there's either zero or not much impingement  
5 on her market, we don't think that that actually  
6 destroys anyone's livelihood.

7           JUSTICE KAVANAUGH: Right --

8           MR. MARTINEZ: Rather, we think that  
9 promotes creativity in -- in artists of all  
10 kinds.

11           JUSTICE KAVANAUGH: Thank you.

12           CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

14           JUSTICE BARRETT: Mr. Martinez, I  
15 think one of the problems that you have, as  
16 evidenced by a lot of the questions that you've  
17 been getting, is with the derivative works  
18 protection, you know, which, in, you know,  
19 106(2), actually talks about transforming any  
20 other form in which a work may be recast,  
21 transformed, or adapted.

22           And it seems to me like your test,  
23 this meaning or message test, risks stretching  
24 the concept of transformation so broadly that it  
25 kind of eviscerates Factor 1 and puts all of the

1 emphasis on Factor 4. I mean, when you've been  
2 asked about book to movie and -- and -- and, you  
3 know, songs, you keep flipping to Factor 4.

4 So, if a work is derivative, like Lord  
5 of the Rings, you know, book to movie, is your  
6 answer just like, "well, sure, that's a new  
7 meaning or message, it's transformative," so all  
8 that matters is 4?

9 MR. MARTINEZ: I -- I don't think that  
10 Lord of the Rings is -- has the -- has a  
11 fundamentally different meaning or message, but  
12 I would have to --

13 JUSTICE BARRETT: The movie?

14 MR. MARTINEZ: -- but I would probably  
15 have to learn more and read the books and see  
16 the movies to give you a --

17 (Laughter.)

18 MR. MARTINEZ: -- definitive judgment  
19 on that. And I recognize reasonable people  
20 could probably disagree on that.

21 I think that with respect to the  
22 derivative work issue, I think textually it's  
23 very important that in the -- in Section 106,  
24 when it's -- talking about -- sorry, in Section  
25 101, when it's defining derivative works and

1 later in the copyright statutes, when it's  
2 giving protection derivative works, it says it's  
3 subject to Section 107. And so, just textually,  
4 we know that the fact that you're a derivative  
5 work doesn't mean fair use is out the window.

6 So is there a -- a tension between  
7 those two in some cases? I think probably there  
8 is some tension, and I think that what it means  
9 is that you need to do a very careful analysis  
10 of new meaning or message, and -- and it's  
11 really going to be only in the cases that --  
12 that there really fundamentally is a new meaning  
13 or message that are going to be able to sort of  
14 satisfy that first factor.

15 With respect to the balance between  
16 Factor 1 and Factor 4, I think Factor 4 plays a  
17 role when it comes to some of the very  
18 challenging hypotheticals that were put forward  
19 by Goldsmith and the government and by the  
20 Court.

21 I don't think it's -- it's -- it's  
22 really that big a deal in this case, though,  
23 because this case really involves a very  
24 fundamental transfer meaning -- transformation  
25 in -- in meaning or message and we think very

1 little impingement on the market under Factor 4.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Jackson?

5 JUSTICE JACKSON: Yes. So I've been  
6 trying to figure out when you continually say  
7 "transformational meaning and message" and  
8 you're focusing on meaning and message, it feels  
9 like it's doing a lot of work with respect to  
10 your Factor 1 analysis, and I think -- I think  
11 that it might be because you're conflating  
12 meaning or message with purpose.

13 What I've heard you say a couple times  
14 is that the purpose of Warhol in this situation  
15 was to essentially convey a different meaning or  
16 message, that, you know, the original was  
17 conveying Prince in a vulnerable light and so  
18 the purpose was to convey him in a more iconic  
19 way.

20 But the statute -- and I think this is  
21 something that Justice Sotomayor has sort of  
22 focused on and to some extent Justice Thomas  
23 with his hypothetical. The statute seems to be  
24 looking at purpose at a -- in a different way,  
25 that it's saying the purpose is, are you using

1 it for commercial nature? Is it going in a  
2 magazine or is it going to a school? When you  
3 look at the actual text of the fair use factors,  
4 it's "purpose and character of the use,"  
5 including whether such use is of a commercial  
6 nature or for nonprofit educational purposes.

7 So I think you're actually treating  
8 purpose differently than in the statute. So can  
9 you --

10 MR. MARTINEZ: Sure. So I think we're  
11 -- we're definitely not conflating meaning or  
12 message with purpose. I think what we're same  
13 is similar to -- it's not quite conflating, but  
14 we think they're related. We think that one way  
15 to get to a different purpose is if you have a  
16 different meaning or message.

17 Let me just give you an example. Say  
18 that you had a portrait of Abraham Lincoln and  
19 Abraham Lincoln was depicted in a heroic way.  
20 And then you had another portrait that depicted  
21 him in a very negative way. I think that the  
22 purpose of both of those works would be  
23 fundamentally different, and it --

24 JUSTICE JACKSON: Absolutely not what  
25 the statute says about purpose. Your -- you

1 just made my point exactly.

2 MR. MARTINEZ: No, Your --

3 JUSTICE JACKSON: That it's not --  
4 there may be a different meaning or message, but  
5 if both of those depictions are going in a  
6 magazine for commercial nature, the purpose, the  
7 reason why you've used it, is -- is the same.

8 MR. MARTINEZ: Well, let's just look  
9 at the moment of creation. At the moment of  
10 creation, they have different purposes, I -- I  
11 -- I think. One -- one is to show Lincoln as a  
12 good guy. One is to show him as a bad guy. And  
13 --

14 JUSTICE JACKSON: So what's -- what is  
15 the work of "including whether such use is of a  
16 commercial nature or for nonprofit educational  
17 purposes"? I thought that was Congress telling  
18 us what kind of purpose it -- you know, it cared  
19 about.

20 MR. MARTINEZ: Right. I think that's  
21 -- Congress is saying that in -- it says  
22 "including," so it doesn't say that's the only  
23 factor, number one. And, number two, as this  
24 Court held in Campbell, the commercial use is  
25 not like the main event and certainly not the

1       only dispositive event.  And that was actually  
2       the -- the exact issue in Campbell.

3                   JUSTICE JACKSON:  No, but it's a type  
4       of purpose.  Why are you doing this?

5                   MR. MARTINEZ:  Of course.

6                   JUSTICE JACKSON:  You're saying why am  
7       I doing this?  Because I want to depict Abraham  
8       Lincoln in a heroic way.  When Congress is  
9       saying why are you doing this, because I want to  
10      put this -- you know, are you doing this because  
11      you want to sell it commercially?  Are you  
12      doing --

13                  MR. MARTINEZ:  But, Your Honor, I -- I  
14      think, if that were the way to -- the right --  
15      the only level of generality to look at -- we're  
16      not -- I'm not denying, by the way, that I think  
17      you could look at purpose in that way, and that  
18      would also be a -- a legitimate way of looking  
19      at it, of -- of considering it.

20                  What I'm saying is that you can't  
21      exclude meaning or message.  And I think the  
22      best case to show that is Campbell because  
23      Campbell, again, you have two works of popular  
24      music that at your level of generality have the  
25      exact same purpose.

1                   Or entertaining people on the radio.  
2           You know, I listened to them on Spotify  
3           yesterday. They have the same purpose. What's  
4           different between them is the difference between  
5           their message.

6                   JUSTICE JACKSON: Why isn't that  
7           character? Why isn't the difference that you're  
8           pointing to character and that's -- and that's  
9           something you factor in? I'm not excluding it.  
10          I'm just saying it's not purpose.

11                  MR. MARTINEZ: We think it's both  
12          purpose and character. We think it's purpose  
13          because the -- the meaning or message that  
14          someone is communicating is tied up with their  
15          purpose. If I give a speech that says vote for  
16          Biden or vote for Obama or vote for Mitt Romney,  
17          I'm giving a speech, but the purpose in giving  
18          the speech is to convince people to -- that --  
19          of my meaning or message.

20                  JUSTICE JACKSON: All right. One  
21          final question. If you -- let's say you win on  
22          this point of the Second Circuit made a mistake  
23          with respect to the way in which they treated  
24          meaning and message and the Court vacates.

25                  Would you want us to go on and deal

1 with the other factors or --

2 MR. MARTINEZ: I don't think the other  
3 factors are briefed up in this Court.

4 JUSTICE JACKSON: Right.

5 MR. MARTINEZ: And so I -- I think,  
6 you know, there are some questions that have  
7 been raised about the other factors. I think  
8 it's reasonable to think that -- that there  
9 might be some factual issues there that should  
10 go back -- probably maybe even back to the  
11 district court. It could even require a trial.

12 We won at summary judgment on -- on  
13 that. But, if you thought differently or had  
14 concerns about Judge Koeltl's treatment of the  
15 other factors, I think that would be the  
16 appropriate disposition.

17 Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 MR. MARTINEZ: Thank you.

21 CHIEF JUSTICE ROBERTS: Ms. Blatt.

22 ORAL ARGUMENT OF LISA S. BLATT

23 ON BEHALF OF THE RESPONDENTS

24 MS. BLATT: Thank you, Mr. Chief  
25 Justice, and may it please the Court:

1 Fair use is an affirmative defense.  
2 It involves a multi-factor balancing test, and  
3 Factor 1 focuses on purpose: What is the reason  
4 or justification to take another's copyrighted  
5 work?

6 The reason can't be to avoid paying  
7 the customary price or the drudgery of coming up  
8 with something fresh. The copier has to explain  
9 why it needed and not just wanted to use someone  
10 else's expression.

11 Here, Petitioner has never given any  
12 reason for copying Ms. Goldsmith's picture to  
13 commercially license Warhol's Orange Prince in  
14 2016. Indeed, Warhol got the picture only in  
15 1984 because Ms. Goldsmith was paid and  
16 credited.

17 Petitioner responds Warhol is a  
18 creative genius who imbued other people's art  
19 with his own distinctive style.

20 But Spielberg did the same for films  
21 and Jimi Hendrix for music. Those giants still  
22 needed licenses. Even Warhol followed the  
23 rules. When he did not take a picture himself,  
24 he paid the photographer. His foundation just  
25 failed to do so here.

1           Petitioner argues adding new meaning  
2    is a good enough reason to copy for free.  But  
3    that test would decimate the art of photography  
4    by destroying the incentive to create the art in  
5    the first place, and it's obvious why the  
6    multi-billion dollar industries of movies,  
7    music, and publishing are horrified.

8           Petitioner's colloquial definition of  
9    the word "transformative" is too easy to  
10   manipulate.  The act also gives creators and not  
11   copiers the right to make derivative works that  
12   transform the original into new ones with new  
13   meaning.

14           If Petitioner's test prevails,  
15   copyrights will be at the mercy of copycats.  
16   Anyone could turn Darth Vader into a hero or  
17   spin off "All in the Family" into "The  
18   Jeffersons" without paying the creators a dime.

19           I welcome your questions.

20           JUSTICE THOMAS:  Ms. Blatt, you -- in  
21   your -- in your brief and then even in your  
22   opening statement, you focus on purpose in 107.  
23   You did not mention character in your opening  
24   statement, and you don't give it a primary role  
25   in your briefs.

1                   What role does it play in your  
2 analysis?

3                   MS. BLATT: Character, I meant -- I  
4 think we don't -- we agree with their definition  
5 that character of the use of the copying is one  
6 of commercial licensing.

7                   And the purpose -- I mean, it's just  
8 -- I think that they are very similar here. The  
9 purpose and character of commercial licensing,  
10 the purpose and character of a parody, I guess,  
11 is very similar, so I'm not sure that they ever  
12 play and haven't seen them play a distinct role  
13 in any of the case law or in the common law for  
14 that matter.

15                  JUSTICE KAGAN: How --

16                  MS. BLATT: But -- yeah?

17                  JUSTICE KAGAN: -- how -- how can you  
18 inquire into purpose and character without  
19 thinking about meaning or message? You know,  
20 what -- what the first factor is really asking  
21 you to do is to say what is this use doing, and  
22 how can you answer that question without  
23 thinking about the use's meaning --

24                  MS. BLATT: So we --

25                  JUSTICE KAGAN: -- its message?

1 MS. BLATT: -- we absolutely think  
2 meaning and message is relevant as it relates to  
3 purpose.

4 JUSTICE KAGAN: So that is different  
5 from what the Second Circuit said, because I  
6 thought the Second Circuit took it out of the  
7 analysis entirely, said it was irrelevant to the  
8 question.

9 MS. BLATT: No. And I -- I think  
10 that's very unfair to three members of Article  
11 III who three times said meaning and message is  
12 relevant. What they --

13 JUSTICE KAGAN: Three members?

14 MS. BLATT: Three times. What they --  
15 three -- yes. Be -- well, it's -- I find it  
16 insulting to the Second Circuit panel when they  
17 said do not assume the role of art critic and  
18 buy this notion of, well, Prince is shy here and  
19 he's iconic there. But, of course, meaning and  
20 message is relevant as to purpose.

21 I mean, I can just keep reading you  
22 quotes, but you know how to read a decision as  
23 best as I do. But, on the very same page  
24 they're yakking about, it says it has to be  
25 reasonably perceived as having a distinctive

1 artistic purpose, one that conveys a new  
2 meaning.

3 It's just saying what you can't have,  
4 and what we're all unified on, the government,  
5 us, and all of our amici, is you cannot have a  
6 bare purpose to add new meaning to someone  
7 else's art for profit.

8 And if that's all he has, he has  
9 nothing else. He has no justification for this  
10 other than I wanted to take someone else's art  
11 and put my own distinctive style on. And one  
12 expert thought that Prince looked happy or dead  
13 or, I don't know, larger than life, and one  
14 thought he looked -- the artist here thought  
15 Prince looked real.

16 And so that is all the Second Circuit  
17 had, was they had a district court opinion that  
18 went completely, this is a Warhol, and, oh, my  
19 God, it's a Warhol, so it's transformative by  
20 definition.

21 And the Second Circuit said: No, no,  
22 we're not going to do that here. You're going  
23 to have to give me something more than this is a  
24 Warhol with a distinctive style.

25 JUSTICE ALITO: Well, what's a --

1 JUSTICE KAGAN: And where do you --

2 JUSTICE ALITO: Go ahead.

3 JUSTICE KAGAN: Where do you get the  
4 idea that it -- you have to need the -- the  
5 original work?

6 MS. BLATT: So where we get the need  
7 is from the five times in Campbell that the  
8 Court said it, but it's --

9 JUSTICE KAGAN: So Campbell doesn't  
10 say that. Campbell says, well, if you need the  
11 original work, that's the paradigmatic case.  
12 But it doesn't say that if you don't need the  
13 original work, the first -- you -- you -- it  
14 can't be transformative.

15 MS. BLATT: So, yeah, let me just  
16 state our -- our test. When the defendant has  
17 an asserted purpose for copying someone else's  
18 work, you ask was there -- was the copying of  
19 the original needed to best achieve the  
20 defendant's -- I'm sorry, yeah, the copier's  
21 purpose?

22 Now, in Campbell, it is very  
23 significant that they are misciting and quoting  
24 Campbell. The Court did not hold it could be  
25 reasonably perceived as having a new meaning.

1 The Court actually held it could be reasonably  
2 perceived as criticizing or commenting on the  
3 original.

4 And without that necessary element and  
5 the Court five times said it was critical, it  
6 was critical, it was the heart, and without the  
7 need to mimic, you have no claim to the victim's  
8 imagination.

9 And why we know that new meaning could  
10 not have been the test --

11 JUSTICE KAGAN: But -- but Campbell  
12 starts with a statement of things being new and  
13 different and encouraging creativity to give new  
14 and different things the kind of fair use pass.

15 And then Google follows up on that and  
16 it doesn't talk a -- in -- in the -- in -- in  
17 your language at all, and it uses Warhol as an  
18 example of how somebody can take an original  
19 work and make it be something entirely different  
20 and that that's exactly what the fair use  
21 doctrine wants to protect.

22 So, you know, I take it that Campbell  
23 has some language that cuts your way in -- in --  
24 in -- in the sense of saying, well, if you are  
25 commenting on the original, that's real fair use

1 protection. We almost don't need to go any  
2 further.

3 But, if you're not commenting on the  
4 original, there's still the -- the possibility  
5 under -- under Campbell and then certainly under  
6 Google that, yes, this is fair use because it's  
7 the kind of thing we think of as truly  
8 transformative.

9 MS. BLATT: So I would say you should  
10 look at a holding over a -- a dicta that uses a  
11 non-statutory word, "transformative," when the  
12 actual word "transformation" is in the statute.

13 The dicta that they're relying on is  
14 saying we think that when you have a parodic  
15 purpose and a parody in the process of shedding  
16 light, which I'm just quoting your words,  
17 shedding light on the original, you benefit  
18 society and create new meaning.

19 But why you know and why all that  
20 matters in this case is they had an affirmative  
21 defense and they just didn't give you a good  
22 reason for copying.

23 And why you know that Campbell just  
24 completely rules that out is what mattered in  
25 Campbell was exclusively the parodic purpose.

1 If new meaning were and message were relevant,  
2 the Court would have been spending the whole  
3 time talking about the pretty woman you wanted  
4 to meet on the street versus all those not so  
5 pretty women you didn't want to meet on the  
6 street that were hairy, bald, two-timing Mr. Mix  
7 and one was pregnant and wasn't sure whose  
8 friend it was. No one was talking about the  
9 women's personalities in Campbell.

10 It was just --

11 CHIEF JUSTICE ROBERTS: Was it, Ms.  
12 Blatt --

13 MS. BLATT: -- were you trying to  
14 criticize. No one was talking about the  
15 personalities of George Washington in Folsom  
16 versus Marsh. It was just, is this a biography  
17 about Washington? And, no, that's too -- that's  
18 too -- that's the same purpose.

19 CHIEF JUSTICE ROBERTS: Ms. -- Ms.  
20 Blatt, you said that what -- the only thing  
21 that's different was the -- the distinctive  
22 style of Warhol.

23 I think your friend's point is -- is  
24 broader than that. It's not just that Warhol  
25 has a different style. It's that unlike

1 Goldsmith's photograph, Warhol's sends a message  
2 about the depersonalization of modern culture  
3 and celebrity status and the iconic -- and --  
4 and it goes through the different features to  
5 support that.

6           So it's not just a different style.  
7 It's a different purpose. One is the commentary  
8 on modern society. The other is to show what  
9 Prince looks like.

10           MS. BLATT: Yes, I think there --  
11 right. And when I say distinctive style, his  
12 distinctive style, by definition, is commenting  
13 on celebrity and dehumanizing him. And we're  
14 saying that that level of what is the  
15 personality, what do we perceive in Prince's  
16 face, or what we think about when we think about  
17 what the author intended, would just drive a  
18 giant hole through a derivative work, which, by  
19 definition, is a work that adds new meaning to  
20 the original.

21           And anytime -- I know he wanted to  
22 stick to book versus movies, but any spinoff,  
23 any adaptation is -- it just starts with a new  
24 meaning. Take "All in the Family." Norman Lear  
25 would be turning over in his grave right now.

1 He had more spinoffs than any show in American  
2 history. "The Jeffersons" was about a  
3 prospering African American family who lived on  
4 the East Side. "All in the Family" was about a  
5 white bigot living in Queens who couldn't keep  
6 up with society. And in his, if I --

7 CHIEF JUSTICE ROBERTS: But they both  
8 were -- they both were television shows, right,  
9 and they were portraying a particular  
10 socioeconomic, whatever, element.

11 This is a whole different thing. The  
12 one is a picture. You want it there to show  
13 what Prince looks like. So it's a photograph,  
14 sure, composed in a particular way and all that.  
15 The other, you're not looking at it. The  
16 message you have -- if you put them side by  
17 side, the message is not the same. The one is  
18 Prince's hair is like this. His expression is  
19 like that. The other one's entirely different.  
20 That's why they put the black around -- around  
21 one eye. That's why it's just the disembodied  
22 face, all of that.

23 And you don't say, oh, here are two  
24 pictures of Prince. You say that's a picture of  
25 Prince, and this is a work of art sending a

1 message about modern society.

2 MS. BLATT: That -- that just would  
3 turn Folsom versus Marsh on its head, which was  
4 they had a completely imaginized autobiography  
5 of -- of George Washington, the first president,  
6 and all that mattered to Justice Story was that  
7 they were depicting -- both works were depicting  
8 the life of George Washington.

9 Your test lies madness in the way of  
10 almost every photograph to a silkscreen or  
11 lithograph or any editing. I guarantee the  
12 air-brushed pictures of me look better than the  
13 real pictures of me, and they have a very  
14 different meaning and message to me.

15 (Laughter.)

16 JUSTICE ALITO: What do you think --

17 CHIEF JUSTICE ROBERTS: Well, I think  
18 that's not right. I mean, I think you would  
19 look at --

20 (Laughter.)

21 CHIEF JUSTICE ROBERTS: -- I think you  
22 would look at both of them, and one would say  
23 those are pictures of the same woman. This one  
24 may look a little better than that one, but it's  
25 the same woman, it's for the same purpose, it's

1 to show what she looks like.

2 But, if you had a picture, a  
3 photograph of you and then a Warhol, you know,  
4 it's just not the same thing. You look at the  
5 Warhol thing and you say, oh, that's -- you  
6 know, that's --

7 MS. BLATT: The -- the problem with --

8 CHIEF JUSTICE ROBERTS: -- counsel.  
9 The other one --

10 MS. BLATT: -- the problem with this  
11 line of -- of theory is you're just putting  
12 photography in its own category and saying  
13 photography can just be ripped to shreds because  
14 you can always edit a picture and make these  
15 arguments, black-and-white versus color, et  
16 cetera. But, once you move to any other type of  
17 medium, books, movies, and songs, these  
18 giants -- there are giants in all these creative  
19 fields who by very -- by the virtue of the fact  
20 that they took someone else's worth -- work and  
21 transformed it into shows that are way more  
22 valuable.

23 If I could just talk about Factor 4  
24 because his answer was just astonishing, that --  
25 the first half of his argument was solve

1 everything under Factor 4. The last half of his  
2 argument is we win in this case under Factor 4  
3 because of a trial in a different market. And  
4 imagine my Jeffersons hypothetical. Everything  
5 he said about Warhol versus a Goldsmith is the  
6 same article you could have said about the  
7 audiences that want to watch "Mork and Mindy"  
8 versus "Happy Days."

9 (Laughter.)

10 MS. BLATT: That is one character from  
11 "Happy Days" involving some Martian who came in,  
12 and Robin Williams was so funny that a whole new  
13 show was created called "Mork and Mindy." They  
14 had nothing to do with one another, different  
15 audiences.

16 And under his view, just everything he  
17 said about Factor 4 you would have a trial in  
18 every single case. And he just basically forces  
19 all authors to go into Factor 4 with one hand  
20 tied behind their back where there's already a  
21 finding that this is a transformative work.

22 Ms. Goldsmith lost a -- lost under  
23 summary judgment under Factor 4 because the  
24 district court said, "hey, you have a  
25 transformative Warhol, and it is inconceivable

1 that somebody would want a shy-looking Prince  
2 over a -- the same market that wants a happy,  
3 iconic Prince."

4 JUSTICE JACKSON: Ms. Blatt, can --

5 JUSTICE ALITO: Ms. Blatt, what --  
6 what do you think the Second Circuit meant when  
7 it yakked about art critics, about judges not  
8 being art critics? Did it -- was the -- was the  
9 point that a judge is supposed to determine  
10 whether -- a -- a person who knows nothing about  
11 either of the works of art is supposed to  
12 determine whether they seem different? You  
13 can't have testimony, evidence about the meaning  
14 of those things?

15 MS. BLATT: So the -- the district  
16 court -- I mean, sorry, the Second Circuit had  
17 left open a very large amounts of type of fair  
18 use that I think -- or, sorry, transformative  
19 purpose that we would not think is correct,  
20 where I think, in their view, you can look at it  
21 objectively.

22 What the district court -- sorry, the  
23 Second Circuit was saying about "don't assume  
24 the role of art critic" was the notion that you  
25 would have such a level of specificity as to the

1     vibe that the -- that the character being  
2     depicted was giving off, just like the -- the  
3     notion of -- you know, we could talk about all  
4     kinds of movies and ad -- adaptations. Was the  
5     character in Jaws, the book, different than the  
6     way the sheriff was depicted in the movie? And  
7     we could give -- The -- The Shining is the best  
8     example. We know Stephen King had a very  
9     specific view of who Jack was. It was basically  
10    him and it was a tragedy, and we know what  
11    Stanley Kubrick did to it. He said, I don't  
12    like your Jack. I'm going to do my Jack, who's  
13    a horror -- a horror film.

14                 JUSTICE ALITO: Suppose that the Mona  
15    Lisa was copyrighted and somebody, a real --  
16    really skillful copyist, made almost an exact  
17    copy. Most people could never detect the  
18    difference, except the -- the copyist changed  
19    the color of her dress.

20                 If you showed those two to most people  
21    today, they would say, well, all right, brown  
22    dress, blue dress, red dress, doesn't make any  
23    difference, right? That's not really important.

24                 But, if you called somebody who knows  
25    something about Renaissance art, the person

1 would say that makes a big difference. If  
2 that's a blue dress, that's sending a message.  
3 If it's a red dress, that's sending a different  
4 message.

5 MS. BLATT: So where I think all this  
6 goes wrong is you're just focusing on meaning  
7 and message independent of the underlying use.  
8 In this case, the -- the -- the statute, just by  
9 its terms, is talking about use.

10 And in the case of the Condé Nast, the  
11 use is to portray Prince. If you reprint our  
12 pictures, whether it's Ms. Goldsmith's or Andy  
13 Warhol's, you're commenting on the pictures. I  
14 don't think you're saying anything about Prince.  
15 Your use of those pictures is to describe and  
16 discuss the case, same way with the briefs and  
17 news articles. These are news reporting or any  
18 kind of commentary about the pictures.

19 And in your Mona Lisa example, fair  
20 use never -- I mean, nobody sues an artist or  
21 sued 2 Live Crew when they were in the recording  
22 studio. You have to look at the actual use.  
23 And in -- and in -- and in Campbell, the Court  
24 said in a parody, fine, we'll give you -- we'll  
25 spot you that, but we'll send it back for a

1 trial under Factor 4. But, if you're going to  
2 start using it for advertising, that doesn't  
3 count as an appropriate use under Factor 1.

4 The same thing was true in Sony. It  
5 wasn't the recording that the Court was focused  
6 on. It was the time shifting. When you watch  
7 it at home, for -- not for money, you know, not  
8 for profit, that's the only way you're going to  
9 be able to see the show that the networks were  
10 -- were offering.

11 JUSTICE BARRETT: So, Ms. Blatt, what  
12 about the use in the museum, like a Warhol  
13 hanging in a museum, versus the use in Condé  
14 Nast and Vanity Fair? Is there any difference?

15 MS. BLATT: Absolutely and for a  
16 variety of reasons. The first is Factor 4. And  
17 we have the largest museum in the world sitting  
18 next to me on my right, who -- who's on my right  
19 and now -- on my left. Factor 4 is just  
20 different. Goldsmith doesn't compete in that  
21 market.

22 On Warhol -- if I can just take you  
23 away from Prince -- and also now that this  
24 Prince Series is famous, I don't see how any  
25 museum can't display these. But the Prince

1 Series is very complicated because of the  
2 license. But, if their poster child for museums  
3 is Andy Warhol, let them tell you what Andy  
4 Warhols they're worried about.

5 He got -- he took all the pictures of  
6 the famous ones or he got a license. Marilyn,  
7 who's I think worth a lot of money now, that  
8 picture is in the public domain. That guy  
9 didn't renew the copyright, Gene Korman, before  
10 he died and the copyright law was passed. So I  
11 don't know what they're worried about.

12 If you look at the pictures in the  
13 museum brief, it's a bunch of naked women. And  
14 no one is trying to say that naked women are  
15 going to be taken down from museums. There is  
16 nothing that -- I just -- the pop art they were  
17 --

18 JUSTICE KAGAN: But maybe there's a  
19 different point about museums, and the point is  
20 why do museums show Andy Warhol? They show Andy  
21 Warhol because he was a transformative artist  
22 because he took a bunch of photographs and he  
23 made them mean something completely different.  
24 And people look at Elvis and people look at  
25 Marilyn Monroe or Elizabeth Taylor and Prince,

1 and they say this has an entirely different  
2 message from the thing that started it all off.  
3 And that's why he's hanging up on those museums.

4 And that's why whatever the Section 4  
5 -- the -- the Factor 4 inquiry might be, that's  
6 why it's hard to look at it and not say under  
7 Factor 1 that's transformation.

8 MS. BLATT: Well, in our view, that --  
9 I mean, I think the government might have a  
10 different view under museums, but everyone  
11 agrees that in museums there's going to be fair  
12 use. And there's also particular provisions,  
13 mainly 109, that both our brief and the  
14 government's brief talk about that separates for  
15 display for museum purposes.

16 But, on your -- under where I think I  
17 disagree with you is just that the display in a  
18 museum of Prince is still copying and still  
19 using Ms. Goldsmith's in a way that doesn't  
20 justify the copying of Ms. Goldsmith.

21 Now she doesn't have market harm,  
22 still fair use, she can't sue. All remedies as  
23 to museums and to possession and sale were  
24 waived here in the complaint. You read the  
25 complaint accurately, but it was all expressly

1 disclaimed.

2           And so all we have here is the  
3 commercial licensing. But you also have a  
4 disclaimer both in the Second Circuit and the  
5 Supreme Court that Warhol doesn't have a claim  
6 -- I'm sorry, that Ms. Goldsmith doesn't have a  
7 claim for museums.

8           JUSTICE JACKSON: Can you -- can you  
9 --

10           JUSTICE SOTOMAYOR: Can the -- excuse  
11 me. Do you have a claim for the original Prince  
12 Series, the original painting?

13           MS. BLATT: So the -- the possession  
14 and physical -- the -- it turns on the license  
15 because, remember, Warhol had -- there was --  
16 these was -- were produced under a license, and  
17 so it's unclear whether all 16 were made  
18 pursuant to that license or made as drafts.

19           And if Warhol wants to -- and -- and  
20 the Warhol -- the Warhol foundation doesn't even  
21 own any of these. So the possession and sale is  
22 not -- wouldn't be respect to them.

23           But assuming that they all -- were all  
24 lawfully created, they can be -- the -- the --  
25 this turns under 109(a), which says you can --

1 you can sell the possession.

2 JUSTICE SOTOMAYOR: So what do you  
3 think --

4 MS. BLATT: What's not protected is  
5 just the commercial licensing.

6 JUSTICE SOTOMAYOR: Justice -- Judge  
7 Jacobs below said he didn't think that the  
8 Second Circuit's decision or injunctive relief  
9 encumbered the original Prince Series -- I'm  
10 quoting him, I think -- or anything that was  
11 hanging in museums and things.

12 Do you read -- what's at issue here?  
13 What use is at issue? Is it the 2000 and --

14 MS. BLATT: Only the commercial  
15 licensing. And I think 46(a) --

16 JUSTICE SOTOMAYOR: What commercial  
17 licensing?

18 MS. BLATT: Of Orange Prince in 2016,  
19 plus --

20 JUSTICE SOTOMAYOR: Right, plus.

21 MS. BLATT: -- there is a request for  
22 injunctive relief for other similar commercial  
23 editorial licensing, so in -- for magazine  
24 usages.

25 JUSTICE JACKSON: Can we go back to

1 your --

2 CHIEF JUSTICE ROBERTS: Thank you.

3 JUSTICE JACKSON: Oh.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice Thomas?

7 Justice Alito?

8 Justice Sotomayor?

9 Justice Kagan?

10 Justice -- Justice Jackson.

11 JUSTICE JACKSON: Yes, thank you. Can  
12 we go back to the necessary condition?

13 MS. BLATT: Mm-hmm.

14 JUSTICE JACKSON: Because I'm still  
15 not quite understanding it.

16 First, I thought there was something  
17 in the legislative history that I may have read  
18 about Congress considering a necessary condition  
19 and taking it out. Does that sound familiar to  
20 you?

21 MS. BLATT: No.

22 JUSTICE JACKSON: No? Okay. Maybe I  
23 made that up.

24 MS. BLATT: That doesn't mean it's not  
25 there. The -- the legislative history, though,

1 is very helpful because it's got -- and I highly  
2 recommend the Menell, Balganesh, Jane Ginsburg  
3 brief because it gives you all of the complete  
4 history and background, and they would read it a  
5 little beyond relation back where it's necessary  
6 to copy, but it basically is limited to these  
7 very core usage -- uses -- usages.

8 JUSTICE JACKSON: But what about --  
9 what about commentary? That's what I'm worried  
10 about, right? The -- the parody, I understand,  
11 you would say it's necessary and so that would  
12 fall into your fair use test.

13 But something like the Campbell's soup  
14 can, where we've already established perhaps he  
15 could have used some other item to make the same  
16 kind of comment, would that not be necessary?

17 MS. BLATT: No, I think that  
18 Campbell's soup fits in two places, and Justice  
19 Kennedy's concurrence in Campbell is really good  
20 on this point.

21 What Justice Kennedy is saying is that  
22 the -- the writer can always pick his target.  
23 You can always pick what book review you want to  
24 critique or what song you want to parody. So  
25 it's never you have to say, well, you didn't

1 necessarily have to pick on my song.

2           So Warhol was entitled to -- to -- to  
3 comment on Campbell's Soup as a form of talking  
4 about consumerism and make whatever broader  
5 point he wanted to make about society.

6           But the Campbell's Soup label, not  
7 only is it a completely different purpose  
8 because one's an advertising logo that goes on a  
9 supermarket shelf to a -- a work of art, but --  
10 and I think the government's brief says this --  
11 he can't have used a generic soup can, he had to  
12 use the Campbell's Soup logo.

13           Same as if he had picked Cheerios.  
14 It would have been really weird to do, but I  
15 guess back then they didn't have the giant  
16 Cheerios, but you've got to use Cheerios to make  
17 your point about consumerism and brand loyalty.

18           JUSTICE JACKSON: You're saying it's  
19 still necessary?

20           MS. BLATT: Absolutely necessary.

21           JUSTICE JACKSON: Some -- some branded  
22 product?

23           MS. BLATT: And what the government  
24 would say, and, obviously, the government can  
25 speak for herself, but it's, they would say, at

1 least useful. And we're okay with that. We're  
2 actually okay with anything other than the new  
3 meaning or message test.

4 JUSTICE JACKSON: But you're -- so --  
5 so you're -- the Second Circuit looked at this a  
6 certain way. And are you saying they -- they  
7 did it wrong?

8 MS. BLATT: No, they did it absolutely  
9 correct because they were just rejecting the  
10 district court and saying, we're leaving open  
11 everything but something that says Prince looked  
12 iconic versus Prince looked shy based on these  
13 interpretations of what one might reasonably  
14 think of Prince's, I don't know, mood or  
15 something, or personality.

16 But I read the Second Circuit as way  
17 broad, saying, you don't have to comment. I  
18 mean, I think they leave open all kinds of stuff  
19 like collages, like if you took a picture of  
20 Prince and made him into a -- like Goldsmith's  
21 Prince and made him into a big butterfly, I  
22 think they would say that's completely fair use.

23 So I think, for your purposes, and  
24 which is what's driving all the -- you know, the  
25 amici being kind of very upset here, is just to

1 reject a new meaning or message test where it's  
2 just a bare, unadorned new meaning or message  
3 test. It's not tied to any purpose other than I  
4 want to make some money off some art and I had  
5 some really cool idea here.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Ms. Dubin.

10 ORAL ARGUMENT OF YAIRA DUBIN

11 FOR THE UNITED STATES, AS AMICUS CURIAE,

12 SUPPORTING THE RESPONDENTS

13 MS. DUBIN: Mr. Chief Justice, and may  
14 it please the Court:

15 Two questions drive Factor 1: Does  
16 the use serve a distinct purpose or instead  
17 supersede the original, and what is the  
18 justification for copying? Both point against  
19 fair use here.

20 The foundation has never tried to show  
21 that copying the Goldsmith photograph's creative  
22 elements was essential to accomplish a distinct  
23 purpose.

24 And the foundation commercially  
25 licensed Warhol's Prince to serve the same

1 purpose as the original, depicting Prince in an  
2 article about Prince.

3 Using another artist's work as a  
4 starting point to turn around and compete  
5 directly with their original has never been  
6 considered fair. The foundation suggests  
7 otherwise, only by urging you to look primarily  
8 to what the silk screens mean rather than why  
9 the copying was justified.

10 The Court should reject that test. It  
11 misreads Campbell, it requires courts to inquire  
12 into the meaning of art, and it would  
13 destabilize longstanding industry licensing  
14 practices that promote the creation of original  
15 works. Sequels, spinoffs, adaptations all  
16 become fair game if conveying a different  
17 meaning confers license to copy.

18 I welcome the Court's questions.

19 CHIEF JUSTICE ROBERTS: Counsel, in --  
20 in what way is the government's position  
21 different from that of Respondents?

22 MS. DUBIN: We agree with Respondent  
23 that the most straightforward way to establish  
24 fair use under the first factor is if your work  
25 is -- if your use is commenting on the original,

1 criticizing it, or otherwise shedding light on  
2 the original, but fair use is an affirmative  
3 defense.

4 And we would leave open to defendants  
5 in various cases to establish that their copying  
6 was justified for other reasons. The problem  
7 with Petitioner's approach here is that they  
8 haven't tried to establish that the copying was  
9 justified, just that the meaning of the works  
10 was different. And the Court has never  
11 recognized that to be a sufficient justification  
12 under the first factor.

13 CHIEF JUSTICE ROBERTS: Well, you  
14 agree, don't you, that the -- the Warhol work is  
15 not a commentary on the Goldsmith photograph,  
16 right?

17 MS. DUBIN: We would agree. And they  
18 have never argued that.

19 CHIEF JUSTICE ROBERTS: And Goldsmith  
20 had a very different purpose than Warhol. She  
21 was photographing Prince. This is what he looks  
22 like.

23 Now a lot goes into that composition,  
24 but it's not that Warhol's work was just a  
25 different composition, was it?

1 MS. DUBIN: We think that the relevant  
2 question is what is the use at issue here, and  
3 the use at issue here is to depict Prince in an  
4 article about Prince, which is very similar to  
5 the purpose at issue when Goldsmith took the  
6 photo.

7 CHIEF JUSTICE ROBERTS: But, if you  
8 really wanted to know what Prince looks like,  
9 you wouldn't get that from Warhol's depiction.  
10 He doesn't have one eye that's, you know,  
11 blacker than the other. He -- his head doesn't  
12 float in the air as it does in Warhol's but not  
13 in Goldsmith's. And that's because -- I think  
14 your friend on the other side would say it's  
15 because the purpose of that picture is not to  
16 show you what Prince looks like. It's supposed  
17 to show you a particular perspective on the pop  
18 era and celebrity status. No?

19 MS. DUBIN: Those changes that Your  
20 Honor is discussing are the same sorts of  
21 changes that really accompany the adaptation or  
22 transformation of any derivative work. You can  
23 imagine all of those comments being made about a  
24 book being transformed into a movie. Those are  
25 comments about a change in style, a change in

1 aesthetic appearance, and things of those  
2 nature.

3 That has never been thought sufficient  
4 under the first factor to be a different  
5 purpose.

6 JUSTICE JACKSON: What about  
7 character? Is that sufficient for character?  
8 You talk about them together. And so is  
9 character doing different work at all in this  
10 analysis?

11 MS. DUBIN: The Court has long  
12 considered them together as a unit and -- and  
13 done an inquiry into purpose and character  
14 together. We think that if you were inclined to  
15 do so, you could look at character as focusing  
16 more on the commercial nature of the works -- of  
17 the use at issue and the purpose as looking to,  
18 you know, what was the justification for  
19 copying.

20 But, either way, you would come to the  
21 same analysis here, which is that this is a  
22 highly commercial use that usurps the market for  
23 the original and that the justification for  
24 copying isn't present.

25 JUSTICE JACKSON: But the meaning of

1 message you say is not indicative of character?

2 MS. DUBIN: That's not our position.  
3 The -- the position is that meaning or message  
4 can be relevant insofar as it assists the Court  
5 in determining what is the purpose and  
6 character. And I think that's exactly what the  
7 Court looked at in Campbell.

8 In Campbell, the Court looked at the  
9 meaning or message of the 2 Live Crew song to  
10 determine if it was, in fact, a parody and  
11 therefore had the purpose and character that  
12 we're looking for under Factor 1.

13 JUSTICE KAGAN: The -- the purpose of  
14 all copyright law is to foster creativity. So  
15 why shouldn't we ask at Factor 1, not in a  
16 determinative way, there's Factors 2, 3, and 4,  
17 but in Factor 1, well, is this really creative?  
18 Is this thing we have here something new and  
19 entirely different? That seems -- it -- you  
20 know, it seems to fit right into why we're  
21 having this inquiry in the first place.

22 MS. DUBIN: The purposes of copyright  
23 law are to serve as the engine of free  
24 expression, but the balance that Congress struck  
25 in achieving that is to say we do that best by

1 protecting the rights of original creators and  
2 protecting the incentive to create with a safety  
3 valve --

4 JUSTICE KAGAN: Except when we don't.  
5 I mean, we protect original creators except when  
6 we don't, and the purpose of the entire thing is  
7 to foster creativity. So why shouldn't we ask  
8 whether, at the follow-on level, there really is  
9 creativity here?

10 And then we can ask a whole bunch of  
11 other questions about -- about markets and --  
12 and so forth, but -- but to -- to -- to take  
13 that out of the analysis, to say it doesn't  
14 matter that some -- that the follow-on work is  
15 -- is -- is adding something of real  
16 significance to artistic expression, why would  
17 we do that?

18 MS. DUBIN: I think the most  
19 significant difficulty with -- with Petitioner's  
20 approach is not -- we're not trying to take it  
21 out of the occasion. It's not about putting  
22 points on the board. It's whether it goes to  
23 the purpose and character of the use.

24 And I think -- maybe this helps with  
25 what Your Honor is driving at. In the statute,

1     there is a specific right given to the copyright  
2     holder to derivative works, to prepare  
3     derivative works, and that provision looks to  
4     whether a secondary work transforms -- that's  
5     the language of the statute -- the original. So  
6     Congress thought about this question and gave  
7     that right to the original copyright holder.

8             Someone who wants to make a  
9     creative -- a very, very creative work can go  
10    and license that work to use it, or they can  
11    justify why they needed to take this work or why  
12    it was essential or highly useful to take this  
13    work in order to create the work.

14            But what's going on here is you have  
15    someone who's just saying my second work was  
16    very creative, my second work was transformative  
17    in the colloquial sense. And that doesn't fit  
18    within the definition of derivative works versus  
19    the safety valve for fair use.

20            JUSTICE JACKSON: Can I -- can I just  
21    paraphrase what I thought I heard you say?  
22    Because I'm not an expert in this area.

23            So the whole of copyright law itself  
24    in this area is to give the person who has the  
25    copyright the right to make other uses of the

1 thing. It's sort of like a property interest in  
2 -- I get to -- I, because I hold the copyright,  
3 get to make other uses. So, when someone else  
4 makes another use of your thing, you then can  
5 question, you then say: Why are you using my  
6 thing to do your work?

7 And I think your argument is, if that  
8 person says I'm using your work because I have a  
9 better idea or because I want to add a little  
10 thing to it or because I want -- that's not  
11 going to be good enough. They have to say I'm  
12 using your work for some other purpose that's --  
13 that's outside of or in addition to I want to  
14 add a new meaning.

15 Am I -- at -- at a very high level of  
16 generality, did I sort of get what your point  
17 is?

18 MS. DUBIN: I think you got it exactly  
19 right, Justice Jackson. That -- that is our --  
20 that is our point. The point is that you have  
21 to justify the copying, not just explain why  
22 your work is a creative addition to the world of  
23 creative additions. And I think that's  
24 important because of the derivative work right  
25 that I was discussing, and it's important

1 because of sort of how the licensing regimes  
2 work across industries where there are many,  
3 many very, very creative people who are  
4 producing derivative works, whether it's the one  
5 that Respondents' counsel already addressed, but  
6 it's -- it's -- you know, it's Spielberg, it's  
7 Scorsese, it is so many people who do tremendous  
8 creative additions to the work that they're  
9 using, but because they don't have the sort of  
10 justification for copying, they need to get a  
11 license.

12 JUSTICE SOTOMAYOR: How do we get --  
13 how do we fit your answer to the following  
14 scenarios, okay? Do you acknowledge that a  
15 commercial licensing would be fair, such as an  
16 authorized reproduction of Orange Prince in an  
17 art magazine or in a book about Warhol?

18 MS. DUBIN: We would analyze that by  
19 running through the four fair use factors, and I  
20 think in that case --

21 JUSTICE SOTOMAYOR: How would you deal  
22 with the first one? Because it is a commercial  
23 use. It's use of a painting that you say is a  
24 derivative -- derivative work. So how do we  
25 explain that?

1 MS. DUBIN: Right. I think Factor 1  
2 and Factor 4 might play out differently than  
3 here. Factor 1, you might say the purpose is to  
4 say something about Warhol, to teach about  
5 Warhol. And under Factor 4, you might say that  
6 it's very unlikely that that would harm the  
7 market for the Goldsmith photograph because her  
8 photograph could not be used for that sort of  
9 occasion.

10 JUSTICE SOTOMAYOR: So how about the  
11 commercial license for Orange Prince, like  
12 happened here? Why do you say it doesn't fit  
13 for a magazine about Prince's life?

14 MS. DUBIN: Because the purpose of the  
15 Goldsmith photograph is to depict Prince, and  
16 while there might be differences in how she did  
17 it and how Warhol did it, they were both being  
18 used in this -- when you compare the two, the  
19 work and the -- and the use, they're both being  
20 used for the purpose of depicting Prince. Let's  
21 have it --

22 JUSTICE SOTOMAYOR: So let's -- let's  
23 go back to Vanity Fair, which was -- it was paid  
24 for, but assume it wasn't, okay? But Fan --  
25 Vanity Fair was an article about Prince, but its

1 focus was on his superstar status, his consumer  
2 sort of life. It seems as if those purposes  
3 coexisted -- not coexisted but were joined at  
4 the hip with using a Warhol because Warhol was  
5 known for making commentary on the very same  
6 issues.

7 So did they -- why would they have  
8 needed a license back then?

9 MS. DUBIN: I think the key to  
10 thinking about this case is what is the  
11 justification for borrowing. Why did you need  
12 to take the creative elements of the Goldsmith  
13 photograph? So, to produce the Warhol version  
14 of Prince, Warhol could have taken a photograph  
15 of Prince himself. He could have used other  
16 photographs. He didn't need to reproduce the  
17 creative elements of the Goldsmith photograph to  
18 have that effect.

19 JUSTICE ALITO: Well, what if Andy  
20 Warhol -- what if Prince would not have sat for  
21 a photo by somebody sent by Andy Warhol, and  
22 Andy Warhol wanted to comment on Prince, and  
23 what he needed was a full-face portrait looking  
24 straight ahead, and I don't know how many of  
25 those were available, but he had to take one of

1 those, so he chose this one?

2           Wouldn't -- wouldn't he have --  
3 wouldn't it be highly necessary for him to take  
4 one of those photos to do what he wanted to do?

5           MS. DUBIN: You might have a different  
6 argument in a case where, you know, someone  
7 has -- is -- has passed away and there's only  
8 one version of the photograph that you could  
9 possibly use. That might be a different case,  
10 and you might be able to establish a  
11 justification for borrowing.

12           And, like I said, we don't want to  
13 foreclose additional justifications working, but  
14 this is a very different case. What happened  
15 here is that Vanity Fair, because they had a  
16 license, picked this photograph and gave it to  
17 Andy Warhol so that he could produce an image of  
18 it. And that's the opposite of having a  
19 justification for borrowing. That's -- I wanted  
20 to start here because it was a very good  
21 photograph of Prince, and that enables Andy  
22 Warhol's duplicative methods because it works to  
23 reproduce that as a photographic negative.

24           JUSTICE ALITO: Is that dependent on  
25 the fact that he could have picked another

1 photo? Do we know that there were other photos  
2 that met the criteria that I mentioned?

3 MS. DUBIN: There were other full --  
4 full-face photographs of Prince. And I think  
5 they're in Respondents' -- in Petitioner's  
6 brief. And I also think very much in his -- in  
7 Andy Warhol's life, after the 1960s, when he was  
8 sued for copyright infringement, he often took  
9 photos of the people he was going to paint, and  
10 so that, you know, was Dolly Parton, Jane Fonda,  
11 and many other celebrities.

12 JUSTICE BARRETT: So I have a question  
13 about the derivatives. When I asked your friend  
14 on the other side about derivative use and the  
15 tension between the transformation point here,  
16 and you also pointed to the language that I  
17 asked Mr. Martinez about, the transformative in  
18 the derivative use provision, he responded to  
19 me, "well, sure, but, you know, that's also  
20 subject to the fair use statute, so they have to  
21 be read, you know, in -- in tandem."

22 What's your response to his point?

23 MS. DUBIN: We think they have to be  
24 read in tandem, although the word "transform" is  
25 in the provision for derivative works, and it is

1 not in the fair use factors. It was, I think, a  
2 shorthand for the purpose and character inquiry  
3 drawn from Judge Leval's articles, which all  
4 look to transformative purpose, not  
5 transformative content, which is, I take it, how  
6 they are framing the case.

7 I do think that if you are sort of  
8 thinking about how to balance those rights and  
9 carve out space, you would never want a reading  
10 of the fair use safety valve that totally  
11 eviscerates the derivative work rights. And  
12 that's what we're particularly concerned about  
13 with Petitioner's test here, because so many  
14 derivative works can be described as conveying  
15 new meanings or messages.

16 JUSTICE KAVANAUGH: You said in your  
17 opening that the position of Petitioner would  
18 destabilize longstanding industry practices. So  
19 why -- can you flesh that out, why you think  
20 that?

21 MS. DUBIN: Yes, and that follows up  
22 -- right up from what I was just saying to  
23 Justice Barrett, which is across industries  
24 there's -- one of the -- the greatest incentives  
25 given to original -- original artists to create

1 particularly in spaces where the original work  
2 maybe doesn't have the same commercial viability  
3 as derivatives, the incentive is the licensing  
4 of derivatives, so whether that's photographers,  
5 books who are hoping that a movie takes their  
6 book, things of that nature.

7 All of those, I think, would be  
8 subject to a different meaning or message  
9 analysis like Petitioner proposes here. And so  
10 it's whether, I think Justice Kagan said  
11 earlier, this -- the plot is changed, the story  
12 line is altered, new characters are added.  
13 Those seem to me it's very hard to distinguish  
14 those from what's going on here, which is  
15 suggesting that a change in a particular face  
16 from vulnerable to iconic is enough to justify  
17 fair use under the first factor.

18 And, you know, Petitioner has said  
19 today that it's really more about putting points  
20 on the board. But the way that I had understood  
21 their test is that they said that that sort of  
22 meaning or message renders fair use presumptive,  
23 and that's in their brief at 40. And I think  
24 that's the particular danger of an approach like  
25 that as to how much it -- meaning or message

1     could tilt the test and how frequent you'd be  
2     able to find a new meaning or message and how  
3     hard it would be to disprove.

4             JUSTICE JACKSON:  So, if we agree with  
5     you that the first -- a -- about the mistakes or  
6     affirm on the grounds of the first factor, why  
7     wouldn't we just vacate and send it back and let  
8     the Second Circuit go ahead and do all the other  
9     aspects of the analysis?

10            You asked us to affirm.  And I'm just  
11     wondering, since it wasn't briefed, two, three,  
12     four, why -- why wouldn't we send it back?

13            MS. DUBIN:  If you agree with us?

14            JUSTICE JACKSON:  Yes.  Are you asking  
15     to affirm?

16            MS. DUBIN:  Yeah.

17            JUSTICE JACKSON:  Yes.  And my  
18     question is, why -- why are you asking to affirm  
19     the entirety of the Second Circuit's analysis in  
20     this case as opposed to sending it back and let  
21     the rest operate?  Is that not what's happening  
22     here?

23            MS. DUBIN:  The Second Circuit made --  
24     ruled on the second, third, and fourth  
25     factors --

1 JUSTICE JACKSON: Correct.

2 MS. DUBIN: -- and they did so  
3 correctly. So there's no reason I don't --

4 JUSTICE JACKSON: But that part is not  
5 briefed. I mean, we haven't gone through the  
6 second -- is that -- is the second, third, and  
7 fourth factors briefed before us now?

8 MS. DUBIN: Petitioner only sought  
9 certiorari on the first factor. So I think, if  
10 you were going to reverse or vacate, you would  
11 do so on the first factor, but I think it is  
12 well within the Court's purview to affirm based  
13 on agreeing with one of -- either how we have  
14 approached fair use under the first factor or  
15 with agreeing with the Second Circuit and then  
16 affirming on the rest of the Second Circuit.

17 JUSTICE JACKSON: But would we go  
18 through the rest of the analysis? We wouldn't  
19 talk about it, we would just affirm and move on?

20 MS. DUBIN: I think that would be what  
21 you would do if you were limiting yourself to  
22 the way that Petitioner has framed this case.

23 If there were things at the point the  
24 Court wanted to clarify to help the lower courts  
25 in this difficult area on a case-by-case basis

1 in the second through fifth -- second through  
2 fourth factors, the Court could -- could  
3 certainly do that.

4 JUSTICE SOTOMAYOR: Can -- can I ask  
5 the question slightly differently, which is  
6 let's assume we adopt Petitioner's first  
7 argument -- argument first raised here, because  
8 he seemed to be saying in his briefs that  
9 meaning and -- that meaning trumps everything  
10 else, but, here, he says it's only one variable.

11 Let's assume that we were to find that  
12 the Second Circuit should have given more weight  
13 to meaning, and so that the first factor is at  
14 either an equipoise or slightly favors him or  
15 whatever, or favors him a lot, why would we  
16 affirm an -- and not vacate and remand?

17 MS. DUBIN: So we think that the --  
18 the Second Circuit did consider meaning or  
19 message. We agree with Respondent. They --  
20 they do mention that they considered meaning or  
21 message several times in their analysis.

22 But, if the Court found that they  
23 didn't weigh it heavily enough or you agree with  
24 the position being put forth by Petitioner  
25 today, then I think the right answer would be to

1 vacate and have the Court run the analysis with  
2 that change on Factor 1.

3 JUSTICE SOTOMAYOR: Okay.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice Thomas, anything further?

7 Justice Alito?

8 Justice Sotomayor, anything further?

9 Justice Kagan?

10 Justice Gorsuch?

11 JUSTICE GORSUCH: I am a little  
12 uncertain about the government's position on  
13 what it means in Factor 1. The purpose of the  
14 use could mean, as we've discussed, they are  
15 both being used for identifying an individual in  
16 a magazine, okay, or it could mean the purpose  
17 of the use could have something to do with the  
18 artistic message being conveyed.

19 It -- it -- I've heard bits of both  
20 flavors from -- from both sides in this case.  
21 And -- and, certainly, the Second Circuit  
22 thought that the -- the latter idea, that  
23 there's some artistic message that's relevant at  
24 Step 1 is part of the analysis.

25 And what is the government's position?

1 I -- I -- I -- I -- I could see possibly saying  
2 oh, no, it's only that it's being used for  
3 commercial purposes in a magazine. It's the  
4 same use of -- of the image and that any  
5 differences between the images is something that  
6 we take account of maybe in -- in Factor 3,  
7 which has to do with the amount and  
8 substantiality of the portion used.

9 Can you help clarify that for me?

10 MS. DUBIN: Yes. We think it's  
11 principally the purpose and character of the  
12 use. It's a broad inquiry. And we're not  
13 trying to carve out certain justifications from  
14 not being made.

15 But what you are looking at is whether  
16 you have a purpose along the lines that is  
17 distinct, right, it's distinct from the original  
18 purpose, and that the use at issue was essential  
19 for you to copy from the underlying work to  
20 accomplish that purpose.

21 And I think that the Court -- what the  
22 Court --

23 JUSTICE GORSUCH: Yeah, I -- I -- I'm  
24 going to stop you.

25 MS. DUBIN: Yeah.

1 JUSTICE GORSUCH: I'm sorry. But that  
2 -- that -- that isn't helpful for me.

3 MS. DUBIN: Okay.

4 JUSTICE GORSUCH: Okay? And -- and --  
5 and -- and maybe I'm being too dramatic in the  
6 difference between the two, but I -- I do see a  
7 way to read Number 1, the first factor, in two  
8 very different ways. The purpose of the use  
9 could be the purpose of this particular use in a  
10 commercial setting, right, I mean, because it  
11 does go on and talk about commercial versus  
12 non-commercial.

13 And, here, we would say they are both  
14 being used in magazine covers to identify an  
15 individual. Okay? Done.

16 Or one could say: Ah, but Andy Warhol  
17 had -- had all sorts of different subjective  
18 meanings and a reasonable viewer could take away  
19 different meanings from them.

20 Is that second thing relevant at all  
21 at the first step in the government's view? And  
22 I'd kind of like a yes or a no if I can get one  
23 out of you.

24 MS. DUBIN: Can I say to -- yes to  
25 part of your question and explain why? Is that

1       okay?

2                       (Laughter.)

3                       JUSTICE GORSUCH:   You -- you can do  
4       whatever you want.   I was just hoping for a yes  
5       or no.

6                       (Laughter.)

7                       MS. DUBIN:   Well, the -- the reason  
8       that I -- the reason that I would like to do  
9       that is because you asked about his subjective  
10      intent, but then you also asked about the  
11      reasonable perception of the audience.   So I  
12      don't think the subjective intent is relevant,  
13      so that's a no to that part of the question.

14                      JUSTICE GORSUCH:   All right.

15                      MS. DUBIN:   But, to the subject, the  
16      audience's perception, I think it can be  
17      relevant and here is how.   I think Campbell's  
18      Soup Cans is -- is a very good example of this.

19                      In Campbell's Soup Cans, the effect on  
20      the viewer, the effect on the audience depended  
21      on the incorporation of a -- of a very  
22      well-known commercial advertising logo.   It  
23      wouldn't have worked if you --

24                      JUSTICE GORSUCH:   Well, let me stop  
25      you there.   And I'm sorry to interrupt again.

1 But, see, Campbell's Soups seems to me an easy  
2 case because the purpose of the use for Andy  
3 Warhol was not to sell tomato soup in the  
4 supermarket. It was to in -- induce a reaction  
5 from a viewer in a museum or in other settings.

6 And the difficulty of this case is is  
7 there -- this -- this particular image is being  
8 used arguably maybe for the same purpose, to  
9 identify an individual in a magazine, okay, in a  
10 commercial setting.

11 So that -- the Campbell's Soup one  
12 seems to me a very different case. And this is  
13 a much harder case. So back to my question.

14 MS. DUBIN: So I completely agree with  
15 you on the purpose of the use being very  
16 different in the Campbell's Soup Can analysis,  
17 which makes it an easier case. But -- and also,  
18 I was also using the Campbell's Soup Can as an  
19 example of why the effect on the audience would  
20 matter. And the effect of the audience in the  
21 Campbell's Soup Can case, it would matter that  
22 you incorporated from a preexisting commercial  
23 advertising logo as opposed to made your own  
24 logo, made up a logo.

25 Whereas, here, if he had taken his own

1 photograph of Prince, that wasn't necessary for  
2 the effect, which is a very different type of  
3 analysis.

4 I hope I answered Your Honor's  
5 question.

6 JUSTICE GORSUCH: You -- you've done a  
7 great job. Thank you.

8 CHIEF JUSTICE ROBERTS: Yes, Justice  
9 Kagan.

10 JUSTICE KAGAN: Can I -- can I just  
11 ask you about that? Because you said it wasn't  
12 necessary. But I had thought that one of the  
13 differences between these two briefs was that  
14 Ms. Blatt says it has to be necessary and that  
15 the government says, well, it -- it's a -- it --  
16 necessary is -- is a significant part of the  
17 question, but, even if it's not necessary, it  
18 can satisfy Factor 1.

19 MS. DUBIN: You're exactly right.  
20 That is a difference between us. I think that  
21 -- and -- and -- and the answer in the  
22 Campbell's Soup Can analysis is probably that  
23 it's not necessary that he needed to use the  
24 Campbell's Soup Can but that -- because maybe he  
25 could have used Cheerios, but that it was highly

1 useful to use that type of advertising logo.

2 I think the best example of those --  
3 of those distinctions is in a book review, where  
4 it's not necessary to incorporate the underlying  
5 book. You can certainly imagine publishing the  
6 book review without incorporating some excerpts  
7 from the underlying work, but then you'd be  
8 telling the reader things as opposed to showing  
9 them. So it makes that far more effective to  
10 the audience.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Kavanaugh?

13 JUSTICE KAVANAUGH: So the exact words  
14 we use on that question in the opinion, if we  
15 were to agree with your side, will undoubtedly  
16 be the subject of a lot of debate, so I want to  
17 get it exactly right.

18 So what are you -- what are you  
19 advocating? I've -- I've heard you say  
20 necessary, essential, or highly useful. Is that  
21 the formulation?

22 MS. DUBIN: We would say that's a  
23 great formulation or you could say necessary or  
24 at least useful or you could say just essential,  
25 and I think that covers it. But I think the

1 best way to explain what the --

2 JUSTICE KAVANAUGH: Okay. Those are  
3 going to be in --

4 (Laughter.)

5 JUSTICE KAVANAUGH: Those are very  
6 different in -- you know, in some courts of  
7 appeals.

8 MS. DUBIN: So -- so the reason --

9 JUSTICE KAVANAUGH: So what's your --  
10 what's your best, like you -- your best answer  
11 as to what the best formulation is from the  
12 perspective of the United States for the opinion  
13 --

14 MS. DUBIN: If you're going --

15 JUSTICE KAVANAUGH: -- if your side  
16 wins?

17 MS. DUBIN: If you're going for the  
18 straightforward clarity of a one-word answer, I  
19 would say essential. The reason we use --

20 JUSTICE KAVANAUGH: No, you can use  
21 multiple words. What's the formulation?

22 (Laughter.)

23 MS. DUBIN: The reason we said  
24 necessary or at least useful and the reason we  
25 used that formulation was because, in a lot of

1 cases and a lot of the most straightforward fair  
2 cases, it will be necessary. And I think that's  
3 why Respondent has used that word.

4 We think that there are cases in which  
5 it is essential or highly useful and those  
6 should also count.

7 JUSTICE KAVANAUGH: So -- so --

8 JUSTICE KAGAN: I always thought  
9 necessary and essential were synonyms. So, if  
10 you say necessary and you say essential, that to  
11 me means the same thing, which is something  
12 different from useful or even highly useful.

13 MS. DUBIN: We think that highly  
14 useful works too. And -- and -- and, like I  
15 said, I think the reason that a highly useful  
16 test would work is in the book review context  
17 that I gave Your Honor earlier, which it's not  
18 necessary, and I think in there's -- a lot of  
19 examples that's the case.

20 I think using the word "necessary"  
21 does lead to more straightforward results in the  
22 mine-run of cases.

23 JUSTICE KAVANAUGH: Okay. I'm going  
24 to really pin you down again on the --

25 MS. DUBIN: Yeah.

1 JUSTICE KAVANAUGH: Necessary or  
2 highly useful or necessary or -- or at least  
3 useful?

4 MS. DUBIN: We would say necessary or  
5 at least useful. And the important thing is  
6 that it's an affirmative defense. So the  
7 defendant in the case is giving a justification  
8 for why their borrowing is necessary.

9 What really separates us from  
10 Petitioner is not necessary versus useful or  
11 essential. It's that we think you need that  
12 justification for borrowing, right? We think  
13 you need some reason why it was essential for  
14 you to incorporate the preexisting work.

15 I think the best formulation given  
16 your considerations here is necessary or at  
17 least useful. That's how I would phrase it for  
18 your opinion.

19 JUSTICE KAVANAUGH: Very helpful,  
20 thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Barrett?

23 JUSTICE BARRETT: So you would leave  
24 out "essential"?

25 (Laughter.)

1 MS. DUBIN: I was deferring to Justice  
2 Kagan, who sees "necessary" and "essential" as  
3 synonyms, but I think that "essential" would  
4 work as well.

5 JUSTICE BARRETT: Okay. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Jackson?

8 JUSTICE JACKSON: And can I just  
9 clarify, essential to incorporate the existing  
10 work in order to what? In order to achieve a  
11 purpose that's different than I just have a  
12 better idea, right, in order to achieve a  
13 purpose that transcends a changed message or  
14 meaning, right?

15 MS. DUBIN: That's exactly right. In  
16 order to achieve a distinct purpose.

17 JUSTICE JACKSON: A distinct purpose?  
18 Thank you.

19 MS. DUBIN: Yes. That's exactly  
20 right.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Rebuttal, Mr. Martinez?

24  
25

1 REBUTTAL ARGUMENT OF ROMAN MARTINEZ  
2 ON BEHALF OF THE PETITIONER  
3 MR. MARTINEZ: Thank you, Your Honor.  
4 I want to address three things,  
5 meaning or message/purpose, indispensability,  
6 usefulness, necessity, and then the consequences  
7 of this case.

8 With respect to meaning or message, I  
9 understood my friend, Ms. Blatt, to concede, she  
10 said it was absolutely true that you could  
11 consider meaning or message at Factor 1 as part  
12 of the -- the purpose inquiry. She said that.

13 I took that to be a very big  
14 difference from what she said in her brief. In  
15 page 2 of her brief, she says it would be a  
16 "fool's errand" to conduct that analysis. And,  
17 on page 22 of her brief, she says that courts  
18 are just incapable of doing this.

19 I think that's a very significant  
20 concession, and we agree with that concession.  
21 We think that it requires a reversal in this  
22 case or at least a vacatur of the Second  
23 Circuit's ruling because, on pages 22 to 23 of  
24 the Second Circuit's analysis, I think they were  
25 unambiguously saying that courts cannot try to

1 do this meaning or message inquiry and then they  
2 go on to say, instead, you need to look at the  
3 degree of visual similarity.

4 Now I'm not sure what the government's  
5 position exactly is, whether they've made the  
6 same concession or not. As I understood the  
7 government's position with respect to purpose,  
8 they continue to hold the line that the level of  
9 generality has to be, these are two portraits of  
10 Prince, therefore, they are the same purpose,  
11 which I understand to mean that if you have two  
12 different portraits of Prince conveying very  
13 different meaning or messages, it doesn't  
14 matter.

15 In other words, they would still  
16 excommunicate meaning or message from the Factor  
17 1 analysis. We don't think that's right. We  
18 don't think it's consistent with the text,  
19 Campbell, Google, all the things that we've  
20 already talked about.

21 Secondly, with respect to  
22 indispensability, I understood my friend, Ms.  
23 Blatt, again, to concede that the position she  
24 took in her brief is -- is not the right one or  
25 at least to say she's fine with the government's

1 much different and lower standard. She went  
2 from indispensability in the brief to usefulness  
3 here at oral argument.

4 With respect to whether usefulness is  
5 required, a couple of things. First of all,  
6 Goldsmith herself conceded usefulness. And if  
7 you just look at -- at page 76a of the Petition  
8 Appendix, the district court quoted her as  
9 conceding usefulness and even perhaps as  
10 conceding necessity.

11 Secondly, usefulness, at least in the  
12 sense that it's been discussed here today, has  
13 not been briefed, has not been argued at any  
14 stage in the case. We heard a long colloquy on  
15 exactly what the varying different standards  
16 mean.

17 If you thought that that was some sort  
18 of requirement, at a minimum, we would need to  
19 have a fair opportunity to satisfy that  
20 requirement once you tell us what the law is.

21 As to what the law should be with  
22 respect to usefulness, we think the real way --  
23 the best way to look at this is it's a question  
24 of justification. And the way you should get  
25 the answer to what kind of justification is

1 required, if you look at Judge -- Judge Leval's  
2 article at page 1111, he talks about the  
3 justification for the taking being the addition  
4 of new meaning or message. We think that's what  
5 Campbell had in mind.

6           Essentially, you're justified in -- in  
7 borrowing at least under Factor 1 to some extent  
8 if you are -- if -- if you're doing something  
9 more than just avoiding the drudgery of coming  
10 up with something new on your own.

11           And, finally, with respect to  
12 usefulness, just on the facts, we absolutely  
13 would satisfy this not just because she conceded  
14 it but because, of course, it's useful for --  
15 for an artist -- for an artist to use an artist  
16 reference. The whole purpose of an artist  
17 reference is to make use of that because it's  
18 useful in creating the work of art, the -- the  
19 second work of art. So, of course, it was -- it  
20 was useful.

21           Goldsmith herself concedes in her  
22 brief that we needed to use a picture of Prince.  
23 And I think both the government and Goldsmith  
24 said that, hey, they could have used any old  
25 picture of Prince, and the examples they give is

1 to point to a bunch of other copyrighted  
2 pictures of Prince that appeared in our brief at  
3 pages 16 to 17.

4 But it can't be the case that their  
5 answer is that we should have borrowed from  
6 someone else and then we'd be having the same  
7 case with a different photographer. I think the  
8 reality, Justice Alito, to your point is any  
9 picture of Prince that was out there in 1984  
10 when Warhol was creating this work, there's  
11 every reason to believe it would have been  
12 copyrighted.

13 The copyright attaches in a photograph  
14 at the moment the photograph is taken. There's  
15 no reason to believe that there would have been  
16 any sort of non-copyrighted option.

17 Finally, Your Honors, consequences.  
18 On consequences, it's really important to  
19 understand that the creation of the Warhol works  
20 is directly at play in this case. If you look  
21 at the request for relief, both sides requested  
22 essentially an adjudication of who owns the  
23 copyright. That turns on whether it was -- the  
24 -- whether the -- Warhol acted lawfully or  
25 unlawfully at the moment of creation.

1           We sought a declaratory judgment, we  
2 sought summary judgment as to all 16 works, not  
3 just the two works, Orange and Purple, that are  
4 at issue here. We sought a declaratory judgment  
5 as to all 16 works. We won that declaratory  
6 judgment. They appealed and they got that  
7 victory overturned.

8           Ms. Blatt says that she's -- in some  
9 other segments of the case, maybe it was at oral  
10 argument, maybe it was at briefing, she sort of,  
11 like, changed the relief she was seeking. It  
12 doesn't matter. We sought a declaratory  
13 judgment on all 16 works. We won that. That's  
14 in play. And the creation matters.

15           I think the other reason the creation  
16 matters, Justice Barrett, to your question, is  
17 because it directly -- it directly governs the  
18 display question when you're talking about  
19 museums.

20           The reason a museum can display a work  
21 under -- under Section 109 is because it was  
22 lawfully made. So the question is, at the  
23 moment it was made, was it lawful?

24           The copyright question of who owns the  
25 copyrights here turns on that. If the -- if

1 Warhol infringed the copyright, it wasn't  
2 lawfully made, Your Honors, this case has  
3 meanings -- has implications beyond just Warhol.  
4 It affects all artists and especially  
5 contemporary artists. We ask you to reverse.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel. The case is submitted.

8 (Whereupon, at 11:45 a.m., the case  
9 was submitted.)

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